(1)

FILED

No. 03 795 NOV 28 2003

In The

Supreme Court of the United States

◆

COMMUNITY ACTION PROJECT OF
TULSA COUNTY, OKLAHOMA,

Petitioner,

v.

JACK DUBBS, et al.,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

Of Counsel
JOHN E. DOWDELL
CHRISTINE D. LITTLE
NORMAN, WOHLGEMUTH,
CHANDLER & DOWDELL
2900 Mid-Continental Tower
Tulsa, Oklahoma 74103
Tel: (918) 583-7571
Fax: (918) 584-7847

WILLIAM S. HELFAND*
KEVIN D. JEWELL
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
1200 Smith Street, Ste. 1400
Houston, Texas 77002
Tel: (713) 658-1818
Fax: (713) 658-2553
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a municipality's official policy is to secure written parental consent before providing medical well-child examinations for children enrolled in its educational program, under what circumstances, if any, can allegedly inadequate consent forms lead to the municipality's direct liability under § 1983 for unreasonable search and substantive due process violations under the Fourth and Fourteenth Amendments?

LIST OF PARTIES

1. Community Action Project of Tulsa County, Oklahoma ("CAP"), Petitioner
2. Jack Dubbs, Individually and as Father and Next Friend of Tiffani Dubbs, a minor, Respondent
3. Francisco Aguirre, Individually and as Father and Next Friend of Jessica Aguirre, a minor, Respondent
4. Joy Brown, Individually and as Mother and Next Friend of Marii Brown, a minor, Respondent
5. Keenya Cowans, Individually and as Mother and Next Friend of Keymiya Cowans, a minor, Respondent
6. Shanika Crowley, Individually and as Mother and Next Friend of Kwanita M. Crowley, a minor, Respondent
7. Raichelle Loftin, Individually and as Mother and Next Friend of Quenten Loftin, a minor, Respondent
8. Elisha Porterfield, Individually and as Mother and Next Friend of LaQuante Porterfield, a minor, Respondent
9. Daphine Suddarth, Individually and as Mother and Next Friend of Ronisha Suddarth, a minor, Respondent
10. Tulsa City-County Health Department, Defendant
11. KD Enterprises, Inc., Defendant
12. Jackie Strayhorn, ARNP, Defendant
13. Kim Baker, RN, Defendant

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

Factual Background 1

Proceedings Below 3

ARGUMENT 6

REASONS FOR GRANTING THE WRIT 6

I. The Court of Appeals has impermissibly broadened the circumstances under which a municipality may be held directly liable for constitutional violations purportedly based on official "policy." The decision below deviates markedly from Supreme Court precedent, effectively giving rise to *respondeat superior* liability in circumstances where it is clearly not permitted 6

A. The issues are of enduring national importance because the Tenth Circuit's holding impacts countless situations where municipalities seek consent for medical examinations 6

TABLE OF CONTENTS – Continued

Page

B. The decision below conflicts with this Court's clear and well established limitations on municipal liability 8

1. CAP's policy is facially constitutional and the court of appeals' contrary characterization ignores this Court's decisions and the record 9

2. The decision below conflicts with precedent of this Court, and other circuits, which apply a "deliberate indifference" standard to claims of omissions or negligence in applying a constitutional policy 12

3. The court of appeals' opinion confounds this Court's jurisprudence mandating an identifiable "policy" be the moving force behind the alleged violation 17

C. Applying the correct test, CAP is entitled to summary judgment 18

II. The court of appeals erred in holding a Fourth Amendment violation occurred because CAP was objectively reasonable in its belief that a genital exam and blood test were included within the scope of consent 21

III. There is no Fourteenth Amendment violation because no deliberate, "conscience shocking" conduct exists 22

CONCLUSION AND PRAYER................................ 23

APPENDIX ....App. 1

TABLE OF AUTHORITIES

Page

CASES

Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584 (10th Cir. 1999) 12

Board of County Commissioners v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) 8, 14, 16, 17

Burge v. St. Tammany Parish, 336 F.3d 363 (5th Cir. 2003) 13

City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) .... *passim*

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) 8, 13, 14

City of Springfield v. Kibbe, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) 10

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) 9

Clark v. City of Draper, 168 F.3d 1185 (10th Cir. 1999) 23

Collins v. City of Harker Heights, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) 23

D.T. by M.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990) 14, 16

Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) 1

TABLE OF AUTHORITIES – Continued

Page

Florida v. Jimeno,
500 U.S. 248, 111 S. Ct. 1801,
114 L. Ed. 2d 297 (1991) 16

Gates v. Unified Sch. Dist. No. 449,
996 F.2d 1035 (10th Cir. 1993) 14, 16

Gibson v. County of Washoe,
290 F.3d 1175 (9th Cir. 2002) 13

Hill v. McIntyre,
884 F.2d 271 (6th Cir. 1989) 13

Hollingsworth v. Hill,
110 F.3d 733 (10th Cir. 1997) 13, 19

Monell v. Dep't of Soc. Servs.,
436 U.S. 658, 98 S. Ct. 2018,
56 L. Ed. 2d 611 (1978) .... *passim*

Myers v. Oklahoma County Bd. of County Com'rs,
151 F.3d 1313 (10th Cir. 1998) 13

N.Y. State Club Ass'n, Inc. v. City of New York,
487 U.S. 1, 108 S. Ct. 2225,
101 L. Ed. 2d 1 (1988) 10

Natale v. Camden County Correctional Facility,
318 F.3d 575 (3d Cir. 2003) 13

New York State Nat'l Organization for Women v. Pataki,
261 F.3d 156 (2d Cir. 2001),
cert. denied, 534 U.S. 1128,
122 S. Ct. 1066, 151 L. Ed. 2d 969 (2002) 10

Palmquist v. Selvik,
111 F.3d 1332 (7th Cir. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

Pembaur v. City of Cincinnati,
475 U.S. 469, 106 S. Ct. 1292,
89 L. Ed. 2d 452 (1986) 13, 15

Sanitation & Recycling Indus., Inc. v. City of New York,
107 F.3d 985 (2d Cir. 1997) 10

Specht v. Jensen,
863 F.2d 700 (10th Cir. 1988) 14

United States v. Elliott,
50 F.3d 180 (2d Cir. 1995) 16

United States v. Marquez,
337 F.3d 1203 (10th Cir. 2003) 16

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) (2003) 1

42 U.S.C. § 1983 (2003) .... *passim*

45 C.F.R. § 1304.20(a)(1)(i) (2003) 7

45 C.F.R. § 1304.20(a)(1)(ii) (2003) 2, 7

45 C.F.R. § 1301.2 (2003) 2

OPINION BELOW

1. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003).

◆

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 21, 2003. Petitioner CAP filed a petition for panel rehearing and a petition for rehearing en banc, which the Tenth Circuit denied on August 29, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

◆

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Due to the length of the relevant constitutional and statutory provisions, they are set forth in the appendix.

◆

STATEMENT

Factual Background.

Petitioner Tulsa Community Action Project ("CAP") is a not-for-profit organization overseeing the federally funded Head Start program, which provides educational and social services to low income families in the Tulsa area. CAP is the local grantee of the federal Head Start

Program in Tulsa, Oklahoma.[1] Plaintiffs/Respondents are children (and their parents) who were enrolled in the Tulsa Head Start program.

Federal regulations applicable to CAP require, as an element of participation, a determination whether each enrolled child is up-to-date on a schedule of age appropriate preventative and primary health care. 45 C.F.R. § 1304.20(a)(1)(ii) (2003). Federal regulations mandate this determination "incorporate the requirements for a schedule of well child care" utilized by the relevant Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, which must include an assessment of "each body system." *Id.* Under applicable performance standards, one of CAP's roles in determining whether child health care is up-to-date is to "work with parents to ensure that health care professionals have conducted the required review of the child's health, and have provided diagnostic testing and treatment, as needed."

In furtherance of these objectives, CAP has contracted with the Tulsa City-County Health Department and other public health care providers to perform physical well child examinations of enrolled children. Here, nurses Strayhorn and Baker, County Health Department employees, conducted well child physicals on November 5, 1998. These included examinations of genitalia as well as blood tests; undisputedly standard components of all well-child exams. Indeed, Respondents' medical expert found no fault with the manner in which the examinations were performed and no child was physically injured as a result of the examinations.

---

[1] CAP is a "Head Start Agency" or "grantee" as defined by 45 C.F.R. § 1301.2. As the lower court correctly held, CAP, a private entity acting under color of state law, enjoys the protections afforded to municipal entities under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). (App. 43) (cases cited).

CAP's policy requires all examinations be conducted with parental consent. CAP normally effectuates its policy by obtaining parental signatures on consent forms. The signed forms at issue here include: (1) a "parent consent form," which solicits permission for a variety of medical procedures, including developmental screening and hemoglobin/HCT tests; and (2) an "authorization for treatment to minors," which authorizes, among other things, both medical diagnosis and treatment.

Proceedings Below.

Respondents do not dispute they consented to general physical exams; the core complaint in this lawsuit is their allegation they did not consent to the genital inspection and, to a lesser extent, blood sampling elements of those exams. Respondents filed suit in the United States District Court for the Northern District of Oklahoma, on their own behalf and on behalf of their minor children. Respondents alleged multiple claims under 42 U.S.C. § 1983, including, most importantly for purposes of this proceeding, unreasonable search and seizure, and due process violations, under the Fourth and Fourteenth Amendments. They also asserted state constitutional and common law claims. (App. 9-10).[2]

---

[2] Respondents asserted deprivations of substantive due process by interfering with the rights of privacy and interference with the parents'

(Continued on following page)

CAP, the County Health Department, KD Enterprises, and the nurses first moved to dismiss, arguing failure to state a claim upon which relief could be granted and, for the individual nurses, qualified immunity. The district court granted the motion to dismiss the substantive due process claims under 42 U.S.C. § 1983 and conspiracy claims under 42 U.S.C. § 1985 and 1986 as to all defendants. The district court granted Baker's and Strayhorn's motions to dismiss based on the nurses' assertion of qualified immunity to the § 1983 claim alleging unreasonable search and seizure. Subsequently, all defendants sought summary judgment on the remaining constitutional and state law claims. The district court granted these motions in a series of orders dated May 16, 2001.

The district court concluded: (1) the examinations were "searches" for purposes of the Fourth Amendment; (2) that the searches were "reasonable" under the Fourth Amendment, both because it was objectively reasonable for the defendants to believe they had consent and because the examinations fell within the "special needs" exception to the Fourth Amendment; (3) alternatively, CAP did not have a pattern or "policy" of unconstitutional conduct (App. 70); (4) the defendants' conduct did not rise to the "shocks the conscience" level necessary to state a substantive due process claim; (5) for various reasons, including consent, Respondents failed to make out a claim under the various state law causes of action; and (6) the individual defendants, Strayhorn and Baker, were entitled to qualified immunity.

---

liberty rights, as well as state common law claims, as more specifically set forth in the court of appeals opinion.

Respondents appealed, arguing, among other things, the trial court erred in entering summary judgment in favor of CAP on the Fourth Amendment claim because the genital exam and blood sampling components of the medical examinations constituted unreasonable searches in violation of the Fourth Amendment to which Respondent parents did not consent. Though the parents acknowledge they signed consent forms, they argued the genital inspection and blood sampling aspects of the well-child examinations were outside the scope of their understanding of their voluntary written consent.

The panel affirmed the judgments in favor of all Defendants except CAP. As to CAP, the panel reversed, holding, in pertinent part here, a fact question existed on whether the examinations constituted Fourth and Fourteenth Amendment violations and whether CAP is liable for its employees' conduct under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). (App. 41-44). With respect to the Fourth Amendment claim, the panel concluded (1) CAP could not have reasonably believed the parents had consented to a genital exam and finger-stick test as part of the well-child physical, notwithstanding Respondents' medical experts' agreement of the propriety of those elements, and (2) CAP was *directly* liable – as opposed to vicariously liable – because CAP drafted consent forms that "would not be understood by a typical reasonable person as constituting parental consent" and, accordingly, use of the forms was a CAP "policy" sufficient to find it was the moving force behind the alleged constitutional deprivations.[3] Thus, the court of appeals held CAP directly liable without discussing or applying the test of entity liability mandated by *Monell* and its progeny, and without discussing whether CAP's mere use of the forms constitutes a "policy" sufficient to be a moving force as contemplated by this Court's precedent.

---

[3] The court also held the "special needs" doctrine did not excuse CAP's failure to obtain consent. (App. 35-41).

CAP filed a petition for panel rehearing and a petition for rehearing en banc, both of which the court denied. (App. 79).

◆

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has impermissibly broadened the circumstances under which a municipality may be held directly liable for constitutional violations purportedly based on official "policy." The decision below deviates markedly from Supreme Court precedent, effectively giving rise to *respondeat superior* liability in circumstances where it is clearly not permitted.

A. The issues are of enduring national importance because the Tenth Circuit's holding impacts countless situations where municipalities seek consent for medical examinations.

The Tenth Circuit decision raises a matter of utmost national concern. The Head Start program reaches almost 50,000 classrooms and CAP is merely one of approximately

1,500 Head Start grantees nationwide.[4] To maintain federal funding, each grantee is required to comply with all Head Start regulations, published at 45 C.F.R. Parts 1301-1311. These regulations mandate Head Start grantees' participation in determining whether each child has an ongoing source of continuous, accessible health care, 45 C.F.R. § 1304.20(a)(1)(i), and securing from a health care professional a determination whether each child is up-to-date on an age appropriate schedule of medical health care. 45 C.F.R § 1304.20(a)(1)(ii). All enrollee children are required to have a physical well-child examination, which can be, and is regularly, provided free of cost by CAP. It is pursuant to these requirements that CAP, and other Head Start grantees, provide well-child exams.

CAP utilizes written consent forms prior to conducting physical exams and the forms at issue here are not unique to CAP. Their language is derived from the federal regulations Head Start grantees are obliged to follow, and is similar to consent forms utilized by other national and local facilities. In fact, Respondents' experts agreed parental consent to treat a child necessarily implies examination of genitalia; a standard and important component of a physical exam for children of this age.

Further, the rule of law ultimately established by this case will affect not only thousands of Head Start providers and enrollee children, but will impact countless similar circumstances where public entities of all types seek to preserve constitutional rights by obtaining consent prior to engaging in conduct or activities that might be considered a "search" or "seizure." CAP's policy is to conduct well-child exams only with parental consent, unquestionably a desirable (and constitutional) policy. Holding a municipality *directly* liable under the Fourth Amendment where its policies are facially constitutional, and available facts do not place it on notice a particular omission is substantially certain to result in a constitutional violation, flatly contradicts this Court's precedent. *E.g.*, *Board of County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1389, 137 L. Ed. 2d 626 (1997); *City of Canton v. Harris*, 489 U.S. 378, 396, 109 S. Ct. 1197, 1208, 1206-07, 103 L. Ed. 2d 412 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

---

[4] *See* Head Start's website, www2.acf.dhhs.gov.

Since *Monell*, this Court has not addressed the parameters of municipal liability in connection with an official municipal "policy" found to be unconstitutional on its face. The Tenth Circuit concluded CAP's "defective" (App. 27) consent forms constitute a facially unconstitutional official policy leading to the municipality's direct liability (App. 42-44), though Respondents have never advanced such a position in this litigation. Without correction by this Court, the court of appeals' decision gives rise to an alarming expansion of governmental liability.

B. The decision below conflicts with this Court's clear and well established limitations on municipal liability.

Included within the question presented by CAP is the issue whether the "deliberate indifference" rule of *City of Canton* and *Brown* applies where a municipality has a facially constitutional policy of securing written consent prior to providing medical examinations and seeks to effectuate that policy through consent forms alleged to be defective or insufficiently broad to encompass the complained of conduct. In other words, can a municipal "policy" be inferred from use of consent forms absent evidence the municipality has prior actual or constructive notice that the consent voluntarily given allegedly fails to cover the act in question – and is deliberately indifferent to that risk – thus leading to the municipality's direct liability? As this Court's and other circuits' precedent indicates, CAP cannot bear direct liability without a showing of deliberate indifference.

1. *CAP's policy is facially constitutional and the court of appeals' contrary characterization ignores this Court's decisions and the record.*

In considering whether a municipality itself violates constitutional rights, the focus is on the municipality's "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (quoting *Monell*, 436 U.S. at 690, 98 S. Ct. at 2018). CAP's uncontroverted policy is that "all examinations be conducted with parental consent." (R. 937).[5] Respondents' complaint is not, and never has been, that CAP's attempt to obtain parental consent is inherently constitutionally unsound, but rather that CAP's consent forms are inadequate to secure *full* parental consent for well-child physicals which properly include genital exams and blood sampling through a finger "prick."[6] In other words, Respondents' complaint pertains only to the scope of the consent they thought they gave.

---

[5] CAP refers to the appendix filed in the court of appeals as the "record," and abbreviates record cites as "R. [page]."

The Tenth Circuit supported its reversal of the summary judgment – evading *Monell's* essential limitations on municipal responsibility – by holding CAP's liability to be "direct, not vicarious." (App. 44). According to the court of appeals, CAP's use of the consent forms, by itself, was sufficient to demonstrate a "policy" of CAP, as that term is contemplated by *Monell*. This conclusion contravenes federal precedent and ignores the record.

First, if application of municipal policy "does not compel a constitutional violation" it is constitutionally sound on its face. *See City of Springfield v. Kibbe*, 480 U.S. 257, 107 S. Ct. 1114, 1120, 94 L. Ed. 2d 293 (1987) (O'Connor, J., dissenting from improvident grant). In other words, a policy is not facially offensive to the constitution – and therefore not the basis of municipal liability – where it is capable of constitutional execution. *New York State Nat'l Organization for Women v. Pataki*, 261 F.3d 156, 171 (2d Cir. 2001), *cert. denied*, 534 U.S. 1128, 122 S. Ct. 1066, 151 L. Ed. 2d 969 (2002). Notably, it is a "heavy burden" to demonstrate a policy "'could *never* be applied'" in a constitutional manner. *See Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997) (quoting *N.Y. State Club Ass'n, Inc. v. City of New York*,

---

[6] As the trial court observed, Respondents have never contended they did not consent to physical exams generally. (App. 65). Respondents have not disputed this on appeal.

487 U.S. 1, 11, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988)) (emphasis added).

Here, CAP's policy that all well-child examinations be conducted with parental consent is most definitely capable of execution in a constitutionally permissible manner. Only where a party questions the adequacy or scope of the consent given would Fourth Amendment issues potentially arise – precisely the argument advanced by Respondents. Hence, CAP's policy is facially constitutional and the Tenth Circuit's contrary ruling is irreconcilable with Supreme Court and interpretive jurisprudence.

Second, holding CAP "directly" liable based on its use of purportedly "defective" consent forms disregards critical judicial admissions by Respondents. Throughout this case, and in the court of appeals particularly, Respondents argued CAP's liability rests upon its *omissions* and *failures* in the use of the consent forms, as opposed to a facially invalid policy. Respondents have *never* contended CAP is directly liable because its policy of obtaining parental consent is itself constitutionally infirm. Rather, the allegedly inadequate consent forms, according to Respondents, led "indirect[ly]" to the claimed violations.[7] (Appellants' brief, p. 31-32). Having thus restricted their claims to the "indirect" sort brought about by alleged omissions or failures to act, it was incumbent upon Respondents, in order to avoid summary judgment, to demonstrate CAP elected to deliberately follow a course of action which was so inadequate that its policymakers acted deliberately indifferent to a specific need leading to the violation of constitutional rights in question. *City of Canton*, 109 S. Ct. at 1206-07. Contrary to the circuit court's holding, "[o]nly where a municipality's failure . . . in a relevant respect evidences a 'deliberate indifference' to the rights of [plaintiffs] can such a shortcoming be properly thought of as a [municipal] 'policy or custom' that is actionable under § 1983." *Id.* at 1205. Importantly, Respondents *conceded* the applicability of a heightened evidentiary requirement, as *they* argued in their appellate brief that a "reckless disregard" standard governed this case. (Appellants' brief, p. 32).[8]

---

[7] Respondents have characterized CAP's alleged shortcomings as the use of "misleading" consent forms. (Appellants' brief, p. 32).

2. *The decision below conflicts with precedent of this Court, and other circuits, which apply a "deliberate indifference" standard to claims of omissions or negligence in applying a constitutional policy.*

The essence of § 1983 liability grounded on official policy or custom – Respondents' chosen theory[9] – is the notion that the defendant engaged in a deliberate deprivation of the plaintiffs' constitutional rights. Liability under § 1983 attaches where policymakers elect consciously to follow a course of action, from among various alternatives, which is so inadequate that the policymakers acted deliberately indifferent to a specific need leading to the violation of constitutional rights. *City of Canton*, 109 S. Ct. at 1206-07. In reviewing allegations that a municipal policy or custom caused the violation of a plaintiff's constitutional rights, courts are charged to carefully examine the evidence to ensure vicarious liability is not imposed. *E.g.*, *Tuttle*, 471 U.S. at 823-24, 105 S. Ct. at 2436-37. A policy may be shown "where – and only where – a deliberate choice to follow a course of action is made from among various alternatives." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452 (1986). Here, however, the circuit court opinion endorses – indeed essentially mandates – vicarious liability.

---

[8] Though Respondents used the term "reckless disregard" in their brief, CAP submits that a "deliberate indifference" standard is mandated by this Court, and a mere showing of "recklessness" is insufficient. *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 597 (10th Cir. 1999) (mere lack of concern or recklessness insufficient for § 1983 liability). Nonetheless, Respondents' evidence here meets neither test.

[9] Respondents have never based their § 1983 claims on the theory that the alleged unconstitutional acts were carried out by a CAP employee with "final policy making" authority with respect to the challenged action.

In analyzing entity liability under § 1983, federal courts repeatedly observe the necessity of proving deliberate indifference by the governing body's decision making authority in cases where, like here, constitutional claims are based on a municipality's alleged inadequacies, failures, or omissions in effectuating a facially constitutional official policy. *See, e.g.*, *City of Canton*, 489 U.S. at 387; *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003); *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 584-85 (3d Cir. 2003); *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 (9th Cir. 2002); *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989); *Myers v. Oklahoma County Bd. of County Com'rs*, 151 F.3d 1313, 1318-19 (10th Cir. 1998) (inadequate police training); *Hollingsworth v.*

Hill, 110 F.3d 733, 745 (10th Cir. 1997) (cases cited); *Palmquist v. Selvik*, 111 F.3d 1332, 1345-46 (7th Cir. 1997); *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1040-43 (10th Cir. 1993) (§ 1983 liability must be predicated on deliberate deprivation of constitutional rights); *D.T. by M.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176, 1192-93 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990); *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988) (alleged illegal search; failure to train).

When a plaintiff's constitutional claims rest upon indirect liability flowing from allegedly inadequate procedures, omissions, or failures, the policymakers must have elected deliberately to follow a course of action from among various alternatives which is so inadequate as to constitute deliberate indifference to a specific need and which in turn leads to the violation of constitutional rights. *See City of Canton*, 109 S. Ct. at 1206-07. In these situations, this Court applies "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 117 S. Ct. at 1389. Again, the required showing of deliberate indifference might only be excused in circumstances where the challenged policy is itself facially repugnant to the constitution. *See, e.g., Brown*, 117 S. Ct. at 1389; *Tuttle*, 471 U.S. at 822-23. The Tenth Circuit's decision here is irreconcilably at odds with these authorities.

Cases involving alleged inadequate police training provide an apt analogy. For example, in *City of Canton*, this Court held inadequate training could represent a "policy" for which liability could be imposed upon a local government, but to establish the existence of such a policy the court required proof of facts evidencing the local government's awareness of a high probability of harm if the municipality failed to act:

> [T]he need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent the policy for which the city is reasonable. . .

Id. (footnote omitted). In a concurring opinion, Justice O'Connor clarified this requirement:

> Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made "a deliberate choice to follow a course of action . . . from among various alternatives."

Id. at 396, 109 S. Ct. at 1208 (quoting *Pembaur*, 475 U.S. at 483, 106 S. Ct. at 1300). As discussed subsequently, CAP had no actual or constructive notice of any potential constitutional problems with its consent forms prior to Respondents' complaints in this case and Respondents presented no evidence of "deliberate indifference."

Under Supreme Court authority, CAP's mere use of a consent form is, by itself, insufficient for direct municipal liability to attach. This Court has historically refused to impose direct municipal liability absent action on the part of a municipality that manifests a deliberate choice that obviously poses a substantial constitutional risk:

> As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Brown, 117 S. Ct. at 1388. This Court should stem the circuit court's attempt to abrogate this rule of law.

Moreover, that CAP should be credited for its good faith efforts to obtain consent and not held liable for mistakenly exceeding the scope of that consent is hardly a remarkable notion, considering the law affords such protection to municipalities in the analogous context where police officers mistakenly exceed the scope of consent or a warrant in conducting a search also governed by the Fourth Amendment. *See, e.g., Florida v. Jimeno,* 500 U.S. 248, 111 S. Ct. 1801, 1802, 114 L. Ed. 2d 297 (1991); *United States v. Marquez*, 337 F.3d 1203 (10th Cir. 2003); *United States v. Elliott*, 50 F.3d 180, 186 (2d Cir. 1995). To the extent CAP was reasonably mistaken regarding the scope of parental consent is at most negligence, which is insufficient to give rise to a Fourth Amendment violation. *See, e.g., Gates*, 996 F.2d at 1043; *D.T.*, 894 F.2d at 1193. It is also difficult if not impossible to reconcile the imposition of direct liability, without a concomitant showing of deliberate indifference, under circumstances where the motivation for seeking parental consent in the first instance is grounded upon recognition of, and adherence to, constitutional rights.

3. *The court of appeals' opinion confounds this Court's jurisprudence mandating an identifiable "policy" be the moving force behind the alleged violation.*

CAP's policy was not the moving force behind the alleged violation. The panel's rationale here consists of no more than the mere observation CAP was responsible for the language on the consent forms; hence, the court of appeals reasoned, CAP is directly liable under *Monell*. Yet, the panel's generality is legally impermissible because, for example, in the context of inadequate police training mentioned above, such reasoning would be comparable to holding a city liable for no reason other than the city's training program represents a policy for which the city is responsible. This is precisely the sort of over-simplification of § 1983 municipal liability this Court rejected explicitly in *City of Canton* and *Brown*. *City of Canton*, 109 S. Ct. at 1205; *Brown*, 117 S. Ct. at 1391-92. Whether CAP is responsible for drafting, printing, or distributing the forms is not the issue. The focus is whether (1) CAP could reasonably believe the forms are constitutionally adequate, and (2) if not, whether the need for different forms – in light of the specific violation alleged here – is so "obvious" and the "inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Id.* The panel opinion is erroreous on both counts because the appellate court's impermissibly simplistic approach pretermitted consideration of the appropriate legal question.

C. Applying the correct test, CAP is entitled to summary judgment.

The panel erred in analyzing the limited potential for CAP's liability under *Monell* and its progeny. Under the circumstances of this case, § 1983 demands a showing CAP was deliberately indifferent to Respondents' rights. Assuming a fact question exists on whether CAP employees violated Respondents' Fourth and Fourteenth Amendment rights – a premise CAP disputes – CAP cannot be liable unless Respondents also demonstrate CAP was "deliberately indifferent" to their rights. The panel decision never reached discussion of this long-established standard, allowing these claimants, and would allow those like them, to proceed to trial without any evidence the municipality consciously chose to use consent forms which would be inadequate to protect their rights. By conspicuously omitting any mention of the "deliberate indifference" standard, the court of appeals leads readers of its published opinion to conclude the court has forsaken an indispensable prerequisite to recovery firmly entrenched in Supreme Court jurisprudence. The panel has rendered *Monell's* limitations meaningless because an employee's non-deliberate, though possibly negligent, attempt to effectuate a facially constitutional policy is exactly what *Monell* is designed to protect.

Had the panel applied the appropriate standards, it would have been compelled to affirm judgment as a matter of law in CAP's favor. A municipality is deliberately indifferent when it "deliberately" or "consciously" fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff. *E.g.*, *Hollingsworth,* 110 F.3d at 745. Under this test, Respondents must show the consent forms presented an "obvious" risk which would "inevitably" lead to the particular constitutional harm alleged, and that CAP was deliberately indifferent to that risk.

Respondents did not, and cannot, meet the requisite standard for several reasons:

- *The language of the consent forms shows no deliberate indifference.* As Jerome Lee explained, the consent forms were designed to further CAP's policy of obtaining parental consent regarding medical care and treatment. (R. 938). The panel is critical of the forms because they do not actually refer to "genital exams." But, while the forms may not specifically enumerate every conceivable aspect of a physical exam, their language is not random. For example, the terms "diagnosis or medical . . . treatment" track the language of the applicable federal performance standards. (R. 718). Also, the forms are similar to those used in other Head Start programs across the country and at local healthcare facilities in the Tulsa area. (R. 938). CAP cannot be liable for referring to the performance standards, other similar programs, and local health care providers who offer the same services in guiding its use of consent forms.

- *Any inadequacy of the consent forms does not rise to deliberate indifference.* To the extent the forms are insufficient to specifically reference each discrete component of a well-child exam, they are not so insufficient as to warrant a conclusion of "deliberate indifference" on CAP's part. The forms obviously grant parental authority for a broad scope of medical health care assessment. This would include a general "physical" exam, as the *parents have never contended they did not consent to a general physical.* They take issue with the genital examination aspect of the exam. Yet, it is objectively reasonable to think that consent to a "physical" would also include a genital exam, considering that (1) the performance standards mandate it, (2) doctors agree it is a routine part of the exam, and (3) the parents have vested the "requirements" of "medical treatment" or diagnosis to the physicians' "best judgment." (R. 689). As Dr. Suhail testified, parental consent to treat a child implies examination of the child's genitals. (R. 664-68). Even Respondents' expert physician agreed genital inspections are a *standard part* of a physical exam for children of this age. (R. 570-71). Thus, the language of the forms does not lead to such an obvious constitutional risk that CAP should be considered "deliberately indifferent" to Respondents' rights.

- *CAP believed it had consent.* At the time of enrollment, CAP informs parents that, to meet Head Start requirements, each enrollee must receive a physical exam. Parents are further advised that CAP will provide medical examinations free of charge if no record of an examination is received. CAP also distributes the consent forms, which was in fact done here. Upon receiving the consent forms, CAP understands it has parental authority to conduct physicals. (R. 937-38).

- *CAP had no prior notice of any constitutional problem with the forms.* Prior to the Tenth Circuit's opinion, CAP had never received any ruling from any court of law indicating its consent forms might be considered constitutionally infirm. Indeed, CAP had never received a single complaint from any parent that prior notification was not received. (R. 938). And to impose § 1983 liability, it is not sufficient to show merely that CAP "should have known" of the risk; a "showing of 'conscious acceptance of a known risk'" is required.

- *CAP's notification procedure negates deliberate indifference.* CAP's customary procedure is to notify parents of the date the physicals will be performed. CAP's procedure to distribute a notice letter to the schools explaining when and where exams will take place and allowing parents an opportunity to attend also negates deliberate indifference to Respondents' rights.

II. The court of appeals erred in holding a Fourth Amendment violation occurred because CAP was objectively reasonable in its belief that a genital exam and blood test were included within the scope of consent.

This case also warrants review as to the appellate court's conclusion that CAP could not have reasonably believed the consent was sufficient to include a genital exam. Again, no one has disputed that the forms are effective or that the parents consented to a physical exam generally, even though the forms do not mention the term "physical examination." Moreover, the parent consent form authorizes a blood test, as the panel acknowledged. (App. 31, n. 8). It is objectively reasonable for CAP to think that consent for a physical exam would necessarily include all the features the required standards, and Respondents' doctor, say it does. Where the language in the performance standards informs the language of the consent forms, where the standards require assessment of "each body system", where the consent forms are similar to others, and where there has been no prior suggestion by any parent or court of law that the consent forms may present a constitutional problem, CAP's belief of consent is objectively reasonable.

III. There is no Fourteenth Amendment violation because no deliberate, "conscience shocking" conduct exists.

The court of appeals' error as to the *Monell* issue compels, by itself, reversal of its decision on the Fourteenth Amendment claim. *Monell* protects CAP from liability under both the Fourth and Fourteenth Amendment claims.

In any event, the Tenth Circuit's ruling on the Fourteenth Amendment due process claim warrants review for additional reasons. The court of appeals' decision hinged completely on its disposition of the consent issue. In fact, the panel flatly declined to decide the parents' substantive due process claim because, according to the panel, "the district court gave only cursory treatment to the parents' substantive due process claims." (App. 17). CAP takes issue with the panel's characterization. As the district court observed (R. 60), any substantive due process claim must represent more than an ordinary alleged tort to be actionable under § 1983, and must "shock the conscience." *Collins v. City of Harker Heights*, 503 U.S. 115, 126, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); *Clark v. City of Draper*, 168 F.3d 1185, 1190 (10th Cir. 1999). To reach that level, the offending action must be *deliberate*, not merely negligent. *Clark*, 168 F.3d at 1190 (emphasis added). Applying this test is not difficult under the facts presented here. Yet the panel refused to do so, thus suggesting the "shocks the conscience" standard has no place in certain Fourteenth Amendment contexts – a conclusion at odds with Supreme Court jurisprudence because those standards govern *any* substantive due process claim.

◆

CONCLUSION AND PRAYER

It cannot be said, consistent with *Monell's* progeny and common sense, that CAP is *directly* liable for Fourth and Fourteenth Amendment violations merely by use of a consent form that is allegedly inadequate to further CAP's otherwise sound constitutional policy of securing parental consent for well-child examinations. In reaching an opposite conclusion, the Tenth Circuit has placed itself in conflict with this Court, and other circuits, as to the questions CAP presents for review. To clarify the circumstances under which municipalities can be directly liable for constitutional violations resulting from official "policy," and to advance the interests of decision uniformity nationwide, this Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted,

WILLIAM S. HELFAND*
KEVIN D. JEWELL
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
1200 Smith Street, Ste. 1400
Houston, Texas 77002
Tel: (713) 658-1818
Fax: (713) 658-2553
* *Counsel of Record*

Of Counsel
JOHN E. DOWDELL
CHRISTINE D. LITTLE
NORMAN, WOHLGEMUTH,
CHANDLER & DOWDELL
2900 Mid-Continental Tower
Tulsa, Oklahoma 74103
Tel: (918) 583-7571
Fax: (918) 584-7847

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JACK DUBBS, individually, and as father and next friend of Tiffani Dubbs, a minor; FRANCISCO AGUIRRE, individually, and as father and next friend of Jessica Aguirre, a minor; JOY BROWN, individually, and as mother and next friend of Marii Brown, a minor; KEENYA COWANS, individually, and as mother and next friend of Keymiya Cowans, a minor; SHANIKA CROWLEY, individually, and as mother and next friend of Kwanita M. Crowley, a minor; RAICHELLE LOFTIN, individually, and as mother and next friend of Quenten Loftin, a minor; ELISHA PORTERFIELD, individually, and as mother and next friend of LaQuante Porterfield, a minor; DAPHINE SUDDARTH, individually, and as mother and next friend of Ronisha Suddarth, a minor,

Plaintiff-Appellants,

v.

HEAD START, INC., an Oklahoma corporation; INDEPENDENT SCHOOL

Nos. 01-5098 & 01-5177

(Filed Jul. 21, 2003)

DISTRICT, NO. 1 OF TULSA COUNTY, OKLAHOMA; JOHN DOE, Sued as Doe Government Agents 1 through 5, and John Does 1 through 10; JOHN DOES 1 THROUGH 10; PEGGY DOE,

Defendants,

and

COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA, an Oklahoma not-for-profit corporation; TULSA CITY-COUNTY HEALTH DEPARTMENT; KD ENTERPRISES, INC., an Oklahoma corporation; JACKIE STRAYHORN, ARNP; KIM BAKER, sued as: K. Baker, RN,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. NO. 99-CV-732-K(E))

Steven H. Aden, The Rutherford Institute, Charlottesville, Virginia, (John W. Whitehead, The Ruthersford Institute, Charlottesville, Virginia, Jack Y. Goree and Christopher Goree, Goree & Goree, P.C., Tulsa, Oklahoma, and Leah Farish, Tulsa, Oklahoma, with him on the briefs), for Plaintiffs-Appellants.

Kevin D. Jewell, Magenheim, Bateman & Helfand, P.L.L.C., Houston, Texas, Roni S. Rierson, Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, Tulsa, Oklahoma, Scott B. Wood, Whitten, Nelson, McGuire, Wood, Terry, Roeslius & Dittrich, Tulsa, Oklahoma, (William S. Helfand and Barbara E. Roberts, Magenheim, Bateman & Helfand, P.L.L.C., Houston, Texas; Galen L. Brittingham, Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, Tulsa, Oklahoma; Elizabeth A. Hart, Whitten, Nelson, McGuire, Wood, Terry, Roeslius & Dittrich, Tulsa, Oklahoma; John E. Dowdell and Christine D. Little, Norman, Wohlgemuth, Chandler, & Dowdell, Tulsa, Oklahoma, with them on the briefs) for Defendants-Appellees.

Before **SEYMOUR** and **McCONNELL**, Circuit Judges, and **KRIEGER**, District Judge.*

McCONNELL, Circuit Judge.

In this civil rights action, parents of eight pre-school children enrolled in the Head Start program in Tulsa, Oklahoma, complain that their children were subjected to intrusive physical examinations, including genital examinations and blood tests, on school premises without parental notice or consent. They claim that the Head Start agency, defendant Tulsa Community Action Project, falsely represented to medical personnel that consent forms had been obtained for each of the children and insisted on examinations even for children with up-to-date physicals supplied by their own doctors. They claim that these examinations violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution and under state law.

---

* The Honorable Marcia S. Krieger, United States District Judge for the District of Colorado, sitting by designation.

In a series of orders, the district court disposed of all claims against all defendants, either on dismissal for failure to state a claim on which relief may be granted or on summary judgment. The district court then ordered the plaintiffs to pay the costs of the litigation.

For the reasons set forth below, we reverse the judgment of the district court insofar as it granted summary judgment on the claims against the Tulsa Community Action Project under the Fourth Amendment, technical battery, and invasion of privacy under Oklahoma law, also reverse the dismissal of the parents' claim under the Fourteenth Amendment, but affirm as to all other claims, and remand for further proceedings, including reconsideration of the assessment of costs against the parents.

Factual and Procedural Background

Head Start is a program designed to provide qualified low-income children with pre-elementary instruction to enable them to succeed when they enter school. Recognizing the connection between health care and educational readiness, Head Start program regulations require Head Start agencies, within 90 days of enrollment of a child in the program, in "collaboration with the parents," to "make a determination as to whether or not each child has an ongoing source of continuous, accessible health care." 45 C.F.R. 1304.20(a)(1)(i). If not, the agency must "assist the parents" in "accessing a source of care." *Id.* In addition, the agency must "[o]btain from a health care professional" a "determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care," in accordance with professional standards. *Id.*, § 1304.20(a)(1)(ii). Again, if children are not "up-to-date" on this schedule of care, the agency is instructed to "assist parents in making the necessary arrangements to bring the child up-to-date." *Id.*, § 1304.20(a)(1)(ii)(A). The regulations do not authorize, nor do they permit, Head Start agencies to provide medical examinations or health care to enrolled children without parental knowledge or consent.

Defendant-Appellee Tulsa Community Action Project ("CAP") is a not-for-profit organization that oversees the Head Start program in Tulsa, Oklahoma. It is a "Head Start Agency" or "grantee" as defined by the applicable regulations, 45 C.F.R. § 1301.2. It receives both state and federal funds. Other defendants (and appellees) are the Tulsa City-County Health Department (the "County Health Department"), K.D. Enterprises ("KD"), and two individual nurses, Jacqueline Strayhorn, ARNP, and Kimberly Baker, RN. CAP contracted with the County Health Department to perform the examinations at issue. The Health Department employed nurses Strayhorn and Baker, who performed the examinations. CAP contracted with KD to perform the educational component of the Head Start program in Tulsa. CAP leased space at the Roosevelt Elementary School, in Tulsa, to administer the Head Start program.

On November 5, 1998, Peggy Terry, a registered nurse and a CAP employee, entered a classroom of pre-school children participating in the Head Start program at Roosevelt Elementary in Tulsa. She announced that the children were to be taken to a another classroom in the building for physical examinations. One parent, Misti Dubbs, who was employed as an aide in the Head Start program, protested that CAP had not obtained consent for the examinations and that many of the families had already turned in physical examination reports from their own doctors. When nurse Terry insisted on examinations for all the children, Mrs. Dubbs approached a KD supervisor who in turn consulted the supervisor of employees at KD's Roosevelt site. Neither of these supervisors intervened.

CAP had previously told the County Health Department that CAP would obtain the requisite consent from parents prior to the medical examinations. Relying on that representation, the Health Department conveyed this information to nurses Strayhorn and Baker. On November 5, Strayhorn and Baker arrived at Roosevelt before the appointed time for the exams and queried the CAP Head Start representative, Peggy Terry, about whether the children's parents had completed consent forms. Strayhorn and Baker looked for consent forms in the students' file folders and found none. The nurses raised concerns about the absence of consent forms with nurse Terry, but Terry assured them that CAP had previously obtained consent and that the proper forms were on file. Strayhorn and Baker relied on that information and proceeded with the exams.

The central question in this case is whether CAP and the other defendants had a reasonable basis for believing that the parents had consented to the examinations.[1] At the time of enrollment in the Head Start program, CAP gave parents of the enrolled children three forms. It is undisputed that these are the only consent forms for medical procedures used by CAP, and that no other form of consent, oral or written, was requested or provided. Two of the forms were to be signed by the parent and returned to CAP. One of these was entitled "Parent Consent Form," and solicited parental permission for eight specified tests "if needed": tuberculosis, speech/language, dental, developmental screening, hearing, hemoglobin/HCT, vision screening, and hearing screening. The form also solicited permission for the child to appear in CAP advertising, for name and phone number to appear on a classroom roster, and for CAP to maintain, use, and release "my child's complete history" for use in "health and educational planning." The second form was entitled "Authorization For Treatment to Minors." It solicited parental consent for "diagnosis or treatment" by a "physician or dentist," as well as transportation to a medical facility "for emergency care." At the bottom of the form, parents were given the option to refuse permission to transport their child "for emergency medical/dental care," and to indicate what should be done "[i]n the event of illness or injury which require emergency medical/dental treatment." Neither of the forms to be signed by parents or guardians authorized a general physical examination or a genital examination.

---

[1] Under some circumstances, child welfare authorities are permitted to override parental refusal of consent to medical or other examinations of their children, upon judicial authorization or in emergency situations. No one contends that this was such a case.

The third form, provided to at least some of the parents, was entitled "Child Health Record: Form 3, Screenings, Physical Examination/Assessment." This was a physical examination form to be filled in and signed by a "health care provider," with a checklist of tests and procedures to be performed. Among the items on this checklist were a blood test (hematocrit or hemoglobin) and a genital examination. Nowhere on Form 3 was there any place for parental signature, acknowledgment, or consent.

Prior to the examinations at issue, at least four of the eight plaintiff parents had arranged for physical examinations by their own physicians. These physicians filled out "Form 3," which was then submitted to CAP. Even though it received these examination forms, CAP arranged to have these children examined along with the others on November 5.

The examinations challenged in this case were conducted in an ordinary classroom, with desks used as examination tables. The examining areas were separated only by partitions, so that it was possible for other children to see or hear portions of the examinations performed on their classmates. According to the plaintiffs, no doctor was present and the nurses were not in uniform, and the children were given no explanation regarding what was happening. The children were required to lower or remove their underclothes and were given a medical examination that included, among other things, a genital exam and blood test. The nurses used "Form 3" to record the results of the examinations. During the examinations, all of the children were subjected to genital inspections. The girls were asked to lay spread-legged on a table where the nurses inspected the girls' labia; in some cases the nurses would "palpate," or touch, the genital area when a visual inspection was not adequate. Similarly, the nurses would palpate the boys' genitals to test for the presence of testes. Blood samples were taken by the finger stick (or "hematocrit") method, which can be frightening to small children. According to the plaintiffs, some of the children were upset and confused about the event, though testimony regarding their exact words was the subject of a motion in limine pending as of the grant of summary judgement. With the exception of Misti Dubbs, who was present in her capacity as a Head Start aide, no parents or guardians were with their children during the examinations. Parents were not given prior notice, and were not informed by telephone that day regarding the examinations. According to CAP, notification letters were prepared and available at the project site, but "[u]nfortunately" were "not distributed to the children to take home to their parents."

The nurses who administered the examinations, Strayhorn and Baker, testified that the exams were in conformity with standards for well-child examinations and were not performed for the purpose of detecting child abuse. The plaintiffs' expert similarly testified that – aside from the lack of consent and the "improper setting" – the examinations were conducted in conformity to standards for well-child examinations. Thus, there is no remaining issue in the case regarding the manner in which the examinations were conducted.

Subsequent to the examinations, eight parents, Jack Dubbs, Francisco Aguirre, Joy Brown, Keenya Cowans, Shanika Crowley, Raichelle Loftin, Elisha Porterfield, and Daphine Suddarth, filed suit in the United States District Court for the Northern District of Oklahoma, on their own behalf and on behalf of their minor children. They asserted multiple causes of action pursuant to 42 U.S.C. § 1983:

unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments; lack of substantive due process by interfering with the right of privacy in violation of U.S. Constitution article IV, § 2, clause 1, and amendments I, IV, IX and XIV; and interference with the parents' liberty rights in violation of U.S. Constitution article IV, § 2, clause 1, and amendments I, IX, and XIV. Under 42 U.S.C. §§ 1985 and 1986, the parents alleged a conspiracy to deprive them of equal protection under the law. They also asserted various state common law and constitutional claims, including: unreasonable search and seizure in violation of Oklahoma Constitution, article 2, § 30; interference with parental liberty rights under Oklahoma Constitution, article 1, §§ 1 and 2, and article 2, §§ 2 and 30; assault; battery; invasion of privacy/intrusion upon seclusion; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence; gross negligence; and medical malpractice.

CAP, the nurses, the County Health Department, and KD first moved to dismiss, arguing failure to state a claim upon which relief could be granted and, for the individual nurses, qualified immunity. The district court granted the motions to dismiss on the substantive due process claims under 42 U.S.C. § 1983 and conspiracy claims under 42 U.S.C. §§ 1985 and 1986 as to all defendants. As to the motions of individual defendants Baker and Strayhorn, the district court granted the motions to dismiss based on the nurses' assertion of qualified immunity to the § 1983 claim alleging unreasonable search and seizure. Subsequently, all defendants sought summary judgment on the remaining constitutional and state claims. The district court granted these motions in a series of orders dated May 16, 2001.

In substance, the district court concluded (1) that the defendants' conduct did not rise to the "shocks the conscience" level necessary to state a claim under substantive due process; (2) that the examinations were a "search" for purposes of the Fourth Amendment; (3) that the search was "reasonable" under the Fourth Amendment both because it was objectively reasonable for the defendants to believe they had consent and because the examinations fell within the "special needs" exception to the Fourth Amendment; (4) that for various reasons, including consent, plaintiffs failed to make out a claim under their various state law causes of action; and (5) that the individual defendants, Strayhorn and Baker, were entitled to qualified immunity.

Standard of Review

The district court granted motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) as to all defendants on the substantive due process claims under 42 U.S.C. § 1983 and conspiracy claims under 42 U.S.C. §§ 1985 and 1986. It also granted motions by the individual defendants Strayhorn and Baker to dismiss under Rule 12(b)(6) for alleged Fourth Amendment violations on grounds of qualified immunity. We will uphold a dismissal under Rule 12(b)(6) "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997) (internal citations omitted), *cert. denied*, 522 U.S. 812 (1997). The legal sufficiency of a complaint is a question of law; therefore, a Rule 12(b)(6) dismissal is reviewed *de* *novo*. *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id., quoting Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir. 1991).

The district court granted summary judgment in favor of the defendants on all remaining claims. We review *de novo* the district court's grant of summary judgment. *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.,* 235 F.3d 1243, 1246 (10th Cir. 2000), *cert. denied,* 532 U.S. 1020 (2001). Accordingly, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When we apply this standard, we examine the record and any reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *19 Solid Waste Dept. Mechs. v. City of Albuquerque,* 156 F.3d 1068, 1071 (10th Cir. 1998).

Discussion

I. Constitutional Claims

The parents contend that the physical examinations conducted on November 5, 1998, violated their constitutional rights, and those of their children, to be free from unreasonable searches under the Fourth and Fourteenth Amendments.[2] They also assert that the physical examinations violated their children's privacy rights, which are protected as a matter of "substantive due process"[3] under the Fourteenth Amendment, as well as their own substantive due process rights.

A. Due Process

The parents maintain that the physical examinations compromised: 1) their children's fundamental right to privacy by interfering with individual bodily integrity, medical decisions related to reproduction, and the right to refuse medical treatment; and 2) their own fundamental liberty interest in the care, custody and management of their children. They claim that these rights are protected under the doctrine of "substantive due process" under the Fourteenth Amendment.[4] The district court dismissed on the ground that a substantive due process claim must be more than an ordinary tort and must shock the conscience of the court. *See, e.g., Tonkovich v. Kansas Bd. of Regents,* 159 F.3d 504, 528 (10th Cir. 1998); *Abeyta By and Through Martinez v. Chama Valley Indep. Sch. Dist. No. 19,* 77 F.3d 1253, 1257-58 (10th Cir. 1996). Applying that standard, the district court dismissed each substantive due process claim, finding that, as alleged, the conduct here did not rise to conscience shocking level.

---

[2] In addition to claims brought under 42 U.S.C. § 1983 for violation of the Fourth and Fourteenth Amendments, the parents pressed claims of conspiracy to deprive them and their children of equal protection of the law and of privileges and immunities guaranteed by the Constitution. 42 U.S.C. §§ 1985, 1986. The district court dismissed for failure to state a claim, and the parents have not appealed this dismissal or briefed these issues in this Court. We therefore do not consider these claims on appeal. *See, e.g., Murrell v. Shalala,* 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (noting failure to develop argument results in denial of appellate review).

[3] Substantive due process is the rubric under which the Supreme Court has addressed unenumerated rights under the Fourteenth Amendment. *See, e.g., Washington v. Glucksberg,* 521 U.S. 702 (1997). There is some debate about whether the Privileges or Immunities Clause of that amendment is the more historically accurate ground for such rights. *See* John Hart Ely, *Democracy and Distrust* 18 (1980); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1257-59 (1992); John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 YALE L.J. 1385, 1466-69 (1992); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition,* 1997 UTAH L. REV. 665, 691-98 (1997). *But see* Robert Bork, *The Tempting of America: The Political Seduction of the Law* 36-39 (1990). As discussed below, because the Fourth Amendment provides the explicit textual source for the rights at issue in this case, this debate does not effect [sic] the resolution of the present case.

We question the district court's rationale for dismissing these claims, for two reasons. First, the district court's evaluation of the seriousness of the defendants' challenged actions was evidently affected by the court's conclusion that the parents consented to the examinations or, in the alternative, that the examinations were necessary to conform to Head Start regulations. Order Granting CAP's

---

[4] In district court, the parents also asserted a violation of their procedural due process rights, which was dismissed on motion for summary judgment. Order Granting CAP's Motion for Summary Judgment dated May 16, 2001, at 14, App. 205-06. In their briefs as Appellants in this court, the parents do not develop this procedural due process claim. It is therefore waived. See *Utahns for Better Transp. v. United States Dept. of Transp.,* 305 F.3d 1152, 1175 (10th Cir. 2002), *citing Phillips v. Calhoun,* 956 F.2d 949, 954 (10th Cir. 1992) ("even issues designated for review are lost if they are not actually argued in the party's brief").

Motion for Summary Judgment, dated May 16, 2001, at 7-12, App. 198-203. For reasons explained below, those conclusions were erroneous as a matter of law. Second, the district court misapprehended the legal standard applicable to purported substantive due process rights that – like the right to consent to medical treatment for oneself and one's minor children – may be "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 117 S.Ct. 2258, 2268 (1997); *Collins v. City of Harker Heights,* 503 U.S. 115 (1992); *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977). It is not implausible to think that the rights invoked here – the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child – fall within this sphere of protected liberty. *See Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 278 (1990) (the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *Troxel v. Granville,* 120 S. Ct. 2054, 2060 (2000) ("the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court"). While the "shocks the conscience" standard applies to tortious conduct challenged under the Fourteenth Amendment, *County of Sacramento v. Lewis,* 523 U.S. 833, 848-51 (1998), it does not exhaust the category of protections under the Supreme Court's substantive due process jurisprudence, or eliminate more categorical protection for "fundamental rights" as defined by the tradition and experience of the nation.

With respect to the children's claims, however, we decline to resolve these questions because the children's interests advanced under the rubric of substantive due process are more precisely addressed under the Fourth Amendment. The Supreme Court has explained:

> Because we have always been reluctant to expand the concept of substantive due process, . . . we [have] held . . . that where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.

Lewis, 523 U.S. at 842 (citations and internal quotations omitted); *cf. Bateman v. City of West Bountiful,* 89 F.3d 704, 709 (10th Cir. 1996) (analyzing a claim under the Takings Clause rather than the Due Process or Equal Protection Clauses). The Fourth Amendment recognizes the "right of the people to be secure in their persons . . . against unreasonable searches. . . . " U.S. Const. amend. IV. As we explain below, the physical examinations challenged here were searches for purposes of the Fourth Amendment, and the privacy interests of the children can fully be vindicated under that "explicit textual source of constitutional protection." *Graham v. Connor,* 490 U.S. 386, 395 (1989); *see also Darryl H. v. Coler,* 801 F.2d 893, 901 n.7 (7th Cir. 1986) (noting that the Fourth Amendment claim in that case involves "the same basic analysis" as a privacy claim under the Due Process Clause). Accordingly, the Fourth Amendment, and "not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Lewis,* 523 U.S. at 842.

The same cannot, however, be said of the parents' Fourteenth Amendment claim regarding their right to direct and control the medical treatment of their children. While the parents have standing to assert a Fourth Amendment claim on their children's behalf, they can assert no independent Fourth Amendment claim of their own under these facts. *Hollingsworth v. Hill,* 110 F.3d 733, 738 (10th Cir. 1997). Yet their substantive due process claim, based on alleged violation of their parental rights, is independent of their children's claim based on unlawful search.

Given the particular posture of this case, we decline to resolve the difficult questions regarding the standard to be applied to this claim because the district court gave only cursory treatment to the parents' substantive due process claims, possibly due to its conclusions regarding consent. Moreover, the parent plaintiffs have not further developed their substantive due process claims on appeal. For these reasons, and because we determine below that a remand is necessary regarding the issue of parental consent, we reverse the district court's disposition of the parents' substantive due process claim and remand to the district court for further consideration.

We turn, then, to the Fourth Amendment claim and the issue of consent.

B. Search and Seizure

Plaintiffs argue that the medical examinations violated the children's right to be free from unreasonable searches under the Fourth Amendment, as applicable to the states through the Fourteenth.[5] This claim raises three subsidiary questions: (1) Were the physical examinations in this case "searches" for purposes of the Fourth Amendment? (2) Did CAP and the other defendants have a reasonable basis for belief that the parents consented to the examinations? (3) Did the examinations fall within the "special needs" exception to the requirement of consent or a warrant?

1. Were the physical examinations in this case "searches" for Fourth Amendment purposes?

The Fourth Amendment to the United States Constitution provides that the Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . . " U.S. Const. amend IV. Under our jurisprudence, "[s]earches conducted without a warrant are *per se* unreasonable under the Fourth Amendment subject only to a few 'specifically established and well-delineated exceptions.'" *Roska v. Peterson,* 328 F.3d 1230,

---

[5] Plaintiffs asserted similar claims under Okla. Const. Art. 2, § 30, which is the state constitutional parallel to the Fourth Amendment. *See Sloan v. Sprouse,* 968 P.2d 1254, 1258 (Okla. Crim. App. 1998). The district court granted summary judgment on these state constitutional claims on the ground that the plaintiffs had not adequately briefed the issue. Nor have they done so in this Court. The claims are accordingly waived. See *Utahns for Better Transp.,* 305 F.3d at 1175, *citing Phillips v. Calhoun,* 956 F.2d 949, 954 (10th Cir. 1992) (deeming claims "waived under the general rule that even issues designated for review are lost if they are not actually argued in the party's brief").

1248 (10th Cir. 2003), *quoting Katz v. United States,* 389 U.S. 347, 357 (1967).

The defendants contend that because the exams were not conducted upon suspicion of criminal activity and the data collected were not to be used for law enforcement purposes, the examinations were not "searches" subject to Fourth Amendment requirements. Relying on *United States v. Attson,* 900 F.2d 1427, 1429-30 (9th Cir. 1990), *cert. denied,* 498 U.S. 961 (1990), they argue that where the alleged search is "noncriminal" and "noninvestigatory," the "application of the Fourth Amendment is limited." CAP Br. 5.

The district court concluded that the defendants were not entitled to summary judgment on this issue, because there was evidence in the record (controverted, to be sure) that discovery of child abuse was one purpose of the exams. Indeed, the district court noted, citing 10 O.S. §§ 7103, 7104, that under Oklahoma law medical professionals would be required to report any evidence of abuse encountered during such routine exams. We agree.

More fundamentally, however, the defendants' contention that the Fourth Amendment does not apply in the "noncriminal" and "noninvestigatory" context is without foundation. The Fourth Amendment protects the right of the people to be "secure in their persons" from government intrusion, whether the threat to privacy arises from a policeman or a Head Start administrator. There is no "social worker" exception to the Fourth Amendment. *See Ferguson v. City of Charleston,* 532 U.S. 67, 76 n.9 (2001) ("we have routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment even though the results were not reported to the police."); *Doe v. Heck,* 327 F.3d 492, 509 (7th Cir. 2003) ("the strictures of the Fourth Amendment apply to child welfare workers, as well as all other governmental employees").[6]

The defendants rely on *United States v. Attson,* 900 F.2d 1427, 1429 (9th Cir. 1990), *cert. denied,* 498 U.S. 961 (1990), for the proposition that because the intent in collecting the data was not for law enforcement purposes the exams were not "searches" subject to Fourth Amendment protections. In *Attson,* a man injured in an automobile accident was taken to a public hospital for emergency treatment. He gave express consent for the taking of blood for medical purposes and blood was drawn for medical purposes, after which information regarding his blood alcohol level was supplied to the police for law enforcement purposes. The Ninth Circuit ruled that the doctor had not performed a search in violation of the Fourth Amendment because the record reflected that the doctor acted solely for health purposes of the patient and acted entirely independently of a governmental intent to collect evidence for use in the defendant's prosecution. *Id.* at 1433. The case is thus distinguishable. In *Attson,* the medical procedure was consensual; the real issue was the legality of providing the results to police. Here, the plaintiffs contend that the medical examination itself was performed without consent.

---

[6] To be sure, searches that have noninvestigatory, noncriminal purposes often fit within the category of "special needs," which are subject to a balancing test rather than to the more rigorous requirement of warrant or consent. The district court held that this is such a "special needs" case, a conclusion we will address below. In this section, we discuss the defendants' more far-reaching contention, that noncriminal, noninvestigatory examinations are not "searches" for Fourth Amendment purposes at all.

Moreover, contrary to the defendants' argument, the *Attson* decision did not suggest that all "noncriminal, noninvestigatory" examinations fall outside the protection of the Fourth Amendment. The court held: "for the conduct of a governmental party to be subject to the fourth amendment, the governmental party engaging in that conduct must have acted with the intent to assist the government in its investigatory or *administrative* purposes and not for an independent purpose." 900 F.2d at 1433 (emphasis added). Thus, even under the Ninth Circuit's interpretation, Fourth Amendment protections extend to searches conducted for "administrative" purposes. In its brief, CAP itself asserts that the exams in this case were "mandated by federal regulation" and that its policy of conducting these exams within ninety days of enrollment was to ensure that it followed these regulations. CAP Br. at 5. The nurses and the County Health Department also characterize the exams as "solely for medical evaluation required by the government." County Health Department and Nurses Br. at 14. Thus, even under the standard of *Attson,* the examinations were searches for Fourth Amendment purposes because they were to determine whether the children were in compliance with federal Head Start regulations.

Nothing in the language of the Fourth Amendment or the precedents of the Supreme Court supports the defendants' restrictive interpretation. The Amendment is expressed in passive voice ("the right of the people to be secure in their persons . . . shall not be violated") without specifying or limiting the governmental actors who are to be constrained. The focus of the Amendment is thus on the security of the person, not the identity of the searcher or the purpose of the search. The Supreme Court has posed the Fourth Amendment inquiry in terms of whether the governmental conduct at issue compromises "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987) (internal quotation omitted); *see also Camara v. Municipal Court,* 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). As the Court has explained:

> Because the individual's interest in privacy and personal security suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards, . . . it would be anomalous to say that the individual . . . [is] fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

O'Connor, 480 U.S. at 715 (internal quotations and citations omitted).

In accordance with this understanding of the purposes of the Amendment, the Supreme Court has held that medical examinations including a blood or urine test trigger, at a minimum, the Fourth Amendment balancing test. *See, e.g., Schmerber v. State of California,* 384 U.S. 757, 767-68 (1966) ("compelled" blood test an intrusion constituting search); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 616-17 (1989) (breathalyzer exam for chemical analysis constitutes search); *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie, County v. Earls,* 122 S.Ct. 2559, 2568-69 (2002) (urine test search triggering Fourth Amendment inquiry under special needs balancing test); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 656-58 (1995) (same); *see Yin v. State of California,* 95 F.3d 864, 874 (9th Cir. 1996), *cert. denied,* 519 U.S. 1114 (1997) (O'Scannlain, J., concurring) ("certain aspects of the routine physical examination at issue here would implicate the requisite 'concerns about bodily integrity,'" and thus trigger protection under the Fourth Amendment). Indeed, in the Court's "special needs" cases involving medical examination procedures, the Court did not hold that the practices at issue were or were not constitutional because they were or were not searches; rather, their permissibility under the Fourth Amendment depended upon the "reasonableness" of the procedure. *See, e.g., Earls,* 122 S.Ct. at 2564 (finding school policy of urine testing a "governmental search" but "reasonable").

The defendants' argument seems to be based, at bottom, on the view that in the absence of a criminal or other investigatory purpose, medical examinations such as those conducted at CAP's Head Start program at Roosevelt Elementary are for the good of the children and should not be hamstrung by legalistic requirements like warrants or consent. We do not doubt that CAP was acting in the interest of the children, as it understood them. But the requirement of patient consent, or of parental consent in the case of minor children, serves important practical as well as dignitary concerns, even when a social welfare agency, like CAP, believes it is acting for the good of the child.

It should go without saying that adequate consent is elemental to proper medical treatment. In medical procedures involving children, ensuring the existence of parental consent is critical, because children rely on parents or other surrogates to provide informed permission for medical procedures that are essential for their care. American Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice,* 95 Pediatrics 314-17 (February, 1995).

Even beyond constitutional values of privacy, dignity, and autonomy, parental notice and consent for childhood physical examinations are of significant practical value. Because of CAP's failure to notify parents in advance of the examinations, no parents were present to provide medical histories, discuss potential issues with the health care professionals, help to explain the procedures to the children, and reassure them about the disturbing and unfamiliar aspects of the exam – which included blood-letting, which is painful, as well as visual and sometimes tactile inspection of genitals by strangers. At least half of the plaintiff children were subjected to a duplicative exam by unfamiliar health care professionals in a makeshift setting, even though they had already obtained exams from their own doctors. These practical consequences might well have been averted by more careful attention to the children's Fourth Amendment rights.

Accordingly, we agree with the district court's conclusion that the physical examinations performed by the defendants in this case constituted "searches" within the meaning of the Fourth Amendment, and thus were unconstitutional unless they were performed with warrant or parental consent, or fall within the "special needs" exception to the warrant requirement.

2. *Did CAP have a reasonable basis for believing that the parents gave consent for the physical examinations?*

As already noted, the central disputed issue in this case is consent. It is well established that a search conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973). Thus, if the trier of fact concluded that the parents in this case, on behalf of their minor children, actually consented to the examinations, there would be no Fourth Amendment violation. *United States v. Rith,* 164 F.3d 1323, 1330 (10th Cir. 1999). Moreover, because the Fourth Amendment prohibits only "unreasonable" searches and seizures, the Supreme Court has held that the Amendment is satisfied when, under the circumstances, it is objectively reasonable for the official to believe that the scope of a person's consent permitted him to conduct the search. *Florida v. Jimeno,* 500 U.S. 248, 251 (1991); *Illinois v. Rodriguez,* 497 U.S. 177, 186 (1990); *United States v. Osage,* 235 F.3d 518, 519-21 (10th Cir. 2000).

CAP maintains that "the evidence unequivocally established, and the district court correctly held, that the parents consented to the medical examinations of their children." CAP Br. 9. That is a misstatement of the district court's holding. The district court analyzed the consent forms used by CAP in this case and found sufficient ambiguities and inconsistencies to permit a jury to conclude that the parents had not given their consent:

> [T]he consent forms are not models of draftsmanship. At one point in their supplemental brief, defendants assert the "Authorization for Treatment to Minors" form must be read in bifurcated fashion, the bottom half limited to emergency care

> and the top half not so limited. The language of the forms is ambiguous at times. For example, plaintiffs' expert Dr. Nelson testified that the "Authorization for Treatment to Minors" form is limited to *treatment,* as the title suggests. However, defendants point out that, in smaller print within the body of the form, it authorizes "*diagnosis* or treatment" (emphasis added), which more clearly suggests a routine physical examination. The forms utilized, as this litigation has brought home to CAP, could have been crafted more precisely. *In other words, if the dispositive issue were whether Parent Plaintiffs gave a fully-informed consent to the specific procedures of genital examination and blood test, the Court would deny summary judgment based upon a genuine issue of material fact.*

Order Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 11, App. 202 (citations omitted; emphasis added). The district court granted summary judgment on the theory that CAP had an "objectively reasonable, good-faith belief in the fact of consent and the scope of that consent." *Id. See also id.* at 203 ("the examinations of all of the Minor Plaintiffs in this case were conducted with a reasonable belief that parental consent had been properly obtained and the scope included genital examination and blood tests"). In other words, the record did not show that the parents actually consented, but CAP had a reasonable belief that they did.

As the Supreme Court's decisions illustrate, there can be cases of ambiguous consent; there is a difference between an individual's actual consent to a search and the reasonableness of a government official's belief that consent was given. *Rodriguez,* 497 U.S. at 183-84. But this is not one of them. In this case, consent – if it existed –

took the form of signatures on forms prepared by CAP and distributed to the parents. The forms themselves indicate precisely what the parents consented to. It is a common-law rule to construe ambiguous language against the interest of the party that drafted it. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62-63 (stating this principle in the context of contract interpretation). If there are any ambiguities here, the drafter of the forms – CAP – is responsible. A trier of fact might well conclude that it is not reasonable to allow the drafter of a defective consent form to claim latitude to go beyond the express terms of the consent on the basis of ambiguities that are its own handiwork.

In the context of a criminal investigation, the Supreme Court has held that the "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno,* 500 U.S. at 251. In the context of this case, the parallel standard of "objective reasonableness" is: what would the "typical reasonable person" have understood by the exchange between the Head Start agency and the parents? Because it is undisputed that the only relevant "exchange" between CAP and the parents was the distribution of the "consent forms" by CAP to the parents and the return of those forms to CAP, the issue here is what the typical reasonable person would have understood by the forms. We must bear in mind that the persons for whom the forms were prepared were not sophisticated professionals, but ordinary parents of low-income children, who had no reason to suppose that they had to parse the small print for hidden meanings.

The record contains three forms distributed and used by CAP: (1) a "Form 3" provided to at least some of the parents at the time of enrollment, but not signed by the parent, to be completed by a medical professional; (2) a form entitled "Parent Consent Form" that contains consent to certain procedures such as hemoglobin/HCT tests and ear exams; and (3) a form entitled "Authorization for Treatment of Minors" that pertains to emergency procedures. CAP contends that "[o]nce CAP received these consent forms, it believed it had parental consent to perform physical examinations on its enrollees." In addition to the forms, CAP points to Head Start program regulations that, it says, require each Head Start enrollee "to receive a physical examination within ninety days of enrollment." It contends that, in light of these regulatory requirements, a Head Start grantee is reasonably entitled to interpret the consent forms signed by the parents as encompassing consent to a general physical examination, including genital examination.[7]

None of these forms proves that the parents consented to the examinations performed here. Only Form 3 appears on its face to have anything to do with general physical examinations, and only Form 3 contains any reference to genital examinations. Form 3, however, is not an instrument for parental consent to an examination. It is a checklist for health care professionals to record medical histories and examination results. Its top portion, the medical history section, specifically says that it is to be filled out by "Head Start Staff or Health Care Provider before Physical Examination/Assessment[,]" while the bottom portion is to be completed by the "Health Care Provider During and After Physical Examination/Assessment." Nowhere on the form is there any place for parental signature.

---

[7] In its brief in this Court, CAP asserts (without citation to the record or briefs) that "the parents concede that they consented to the physical examinations." CAP Br. 12. We can discover no such concession. The parents "concede" that they consented to the procedures specified by the consent forms they signed, and nothing more.

CAP appears to acknowledge that this form was not itself a consent form, but it argues, and the district court agreed, that the form gave notice to the parents that general physical examinations would include blood tests and genital examinations. *See* Order Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 13, App. 204 (referring to the defendants' "objectively reasonable belief that the Form 3 gave Parent Plaintiffs at least constructive notice that the medical examinations would involve the genitalia and a blood test"). The problem with this argument is that the parents did not consent to administration of general physical examinations by CAP-supplied health care professionals. "Form 3" is the form that the parents are asked to supply to their own physicians to record the results of the physical exam and to report the results to the Head Start authorities. At least four of the eight plaintiffs took this form to their own doctors, and supplied the completed form to CAP. Nothing in the language of Form 3 provides any reason to suspect that CAP would conduct physical examinations on its own authority, without further notice or consent by parents.

This understanding is confirmed by the very regulations CAP relies upon. The regulations require the Head Start agency "[i]n collaboration with the parents and as quickly as possible, but no later than 90 calendar days" after enrollment to "[m]ake a determination as to whether or not each child has an ongoing source of continuous, accessible health care," and to "[o]btain from a health care professional a determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care. . . . " 45 C.F.R. § 1304.20(a). As to both determinations, if the child does not have a source of ongoing health care or is not up-to-date on an age appropriate schedule of well child care, the regulations require the Head Start agency to "assist the parents" in satisfying the requirement. *Id.* In no circumstances do the regulations authorize the Head Start agency to subject enrolled children to physical examinations without parental notice or consent. The regulations contain a section entitled "Involving parents," which explicitly requires Head Start agencies to "[c]onsult with parents immediately when child health or developmental problems are suspected or identified," to "[f]amiliarize parents with the use of and rationale for all health and developmental procedures administered through the program," and to "obtain advance parent or guardian authorization for such procedures." *Id.*, § 1304.20(e)(1), (e)(2).

According to these regulations, the parents of Head Start children are responsible in the first instance for obtaining a physical examination and medical history and for providing a report of this to the Head Start agency. This would appear to be the function of "Form 3." If such a form is not provided, the Head Start agency must "assist the parents" in complying. It may well be reasonable for the Head Start agency to make arrangements with the County Health Department to provide free physicals on the premises of the Head Start project, but it is not reasonable to do so without notifying the parents and obtaining their consent, nor is it reasonable to subject children who have already filed an up-to-date "Form 3" to a second examination.

Nor do the other two forms evince consent to the examinations. The "Parent Consent Form" contained in the record provides permission for the following "if needed:" "TB Test," "Speech/Language Services," "Dental Examination/Treatment," "Developmental Screenings," "Hearing Screening," "Hemoglobin/HCT," "Vision Screening," "Hearing Screening," and "Permission . . . to Collect, Maintain, Use and Release . . . Child's Complete History." Nowhere on this form is consent given to the procedures complained of here, such as genital examination.[8] While some of these procedures are typically performed as part of a well-child examination, as the record shows, most or all of them can also be performed outside the context of a physical exam. A form granting consent to certain specified procedures does not constitute consent to other procedures, or to a general physical examination.

Similarly, the form entitled "Authorization for Treatment to Minors" does not evince consent to the examination at issue here. In bold print at the top of the document, the form is entitled "Authorization for Treatment To Minors." "Treatment" is obviously not the same thing as a routine physical examination, and a parent is unlikely to understand it as such. In the middle section, the form authorizes CAP to transport the child "for emergency care" or "emergency dental care," allowing the parents to designate the hospital or dentist of their choice. The bottom of the form is entitled "Refusal to Grant Permission." It allows the parent to sign a statement that "I do not give permission to Tulsa County Head Start to transport my child [space for name] for emergency medical/dental care."[9] The plaintiffs' expert, an experienced pediatrician, testified that a physician would understand this form as "a form for emergency treatment," having "nothing to do with specific on-site consent for a physical examination."

---

[8] The form does, however, authorize a blood test.

As the district court noted, CAP argued that the "Authorization for Treatment to Minors" form "must be read in a bifurcated fashion, the bottom half limited to emergency care and the top half not so limited." Order of Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 11, App. 202. Focusing solely on the top half, CAP argued that although the title of the form is limited to "Treatment," "in smaller print within the body of the form, it authorized '*diagnosis* or treatment' (emphasis added)." "Diagnosis," CAP says, includes examination. But consent forms for parents of children in Head Start programs should not be an exercise in obfuscation and misdirection. The question is what a "typical reasonable person" would understand from the form. A three-part form, whose top part is entitled "treatment," and whose middle and bottom parts are explicitly confined to "emergency" treatment, falls considerably short of the evidence that would be needed to establish conclusively the consensual character of these examinations. At the very least, we cannot agree with the district court's conclusion that there was no issue of material fact regarding the objective reasonableness of CAP's belief that it had consent based on these forms.

---

[9] One parent, Joy Brown, signed in refusal to transport her child for treatment in order that she be the person to transport in such instances. This belies CAP's assertion that "none of the parents ever withdraw [sic] their consent or to limited [sic] their consent in any manner." CAP Br. 10.

Indeed, even if we were to accept CAP's invitation to "read [the form] in a bifurcated fashion," and to focus on the "smaller print within the body of the form" instead of the bold print title at the top, we still would come to the same conclusion: the "Authorization for Treatment To Minors Form" does not grant consent for well-child physical examinations. The top portion of the form reads as follows, in full:

> **Authorization For Treatment to Minors**
>
> We, the undersigned parent(s) or legal guardian of the minor listed below:
>
> ____________________ Birth date: ______________
>
> Do hereby authorize any x-ray examination, anesthetic, dental, medical or surgical diagnosis or treatment by any physician or dentist licensed by the State of Oklahoma and hospital service that may be rendered to said minor under the general, specific or special consent of the TULSA COUNTY HEAD START PROGRAM, the temporary custodian of the minor, whether such diagnosis or treatment is rendered at the office of the physician or dentist to call in any necessary consultants, in his/their discretion.
>
> It is understood that this consent is given in advance of any specific diagnosis or treatment being required, but is given to encourage those persons who have temporary custody of the minor, and said physician or dentist to exercise

> his/their best judgment as to the requirements of such diagnosis or medical or dental or surgical treatment.
>
> This consent shall remain effective during the 1998/99 school year, unless sooner revoked in writing to the Tulsa County Head Start Program.
>
> Parent's Legal Signature ______ Date ________

Putting aside the fact that the first paragraph contains garbled syntax and evidently is missing some words, it does not grant consent for the type of examination at issue here. To begin with, the form does not mention well-child examinations or any other form of general physical exam. It refers, instead, to "diagnosis or treatment." Contrary to CAP's argument in district court, "diagnosis" does not "suggest[ ] a routine physical examination." The term "diagnosis" is defined as "the art or act of identifying a disease from its signs and symptoms." Webster's Third New International Dictionary 622 (1976). While a general physical examination might disclose a disease or condition that warrants a "diagnosis," the well-child examination itself is not a "diagnosis." Moreover, the form is limited to treatment or diagnosis by a "physician or dentist licensed by the State of Oklahoma." Nurses Baker and Strayhorn are neither physicians nor dentists.

In summary, because no form signed by the parents gave CAP explicit authorization to conduct general well-child examinations, including genitalia examinations, the district court should not have held, as a matter of law, that it was objectively reasonable for CAP to believe that it had been given consent to authorize and arrange for the children to be examined. It bears emphasis that this case comes to this Court on appeal of an order granting summary judgment in favor of the defendants. The parents did not move for summary judgment and there is no need for this Court to consider whether, on this record, they would be entitled to it. We hold only that the district court correctly held that the examinations at issue were a "search" for Fourth Amendment purposes, and that the evidence in the record is at least sufficient to permit a trier of fact to conclude that the examinations were not consensual and that it was not objectively reasonable to believe that they were. Accordingly, it is necessary to consider whether these examinations were otherwise "reasonable" or fell within an exception to the warrant requirement.

3. *Did the examinations fall within the "special needs" exception to the requirement of consent or a warrant?*

Not all searches lacking warrants or consent are unconstitutional under the Fourth Amendment. The "touchstone of the Fourth Amendment is reasonableness." *Jimeno,* 500 U.S. at 250; *Vernonia,* 515 U.S. at 652; *see also California v. Acevedo,* 500 U.S. 565, 581-83 (1991) (Scalia, J., concurring); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 7-19 (1997); Telford Taylor, *Two Studies in Constitutional Interpretation* 24-29 (1969). The general rule is that a warrantless search conducted without consent is "presumptively" unconstitutional unless it fits within certain narrow exceptions to the general rule. *Roska,* 328 F.3d at 1040. One of those exceptions is the so-called "special needs" doctrine. *Id.* at 1241.

"Special needs" is the label attached to certain cases where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Earls,* 122 S.Ct. at 2565, *quoting Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987). In special needs cases, the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest. *Id.* at 2565-67. Justice Blackmun first coined the term "special needs" in his concurrence in *New Jersey v. T.L.O.,* 469 U.S. 325, 351 (1985). The Court thereafter adopted the terminology in *O'Connor,* 480 U.S. at 720, and *Griffin,* 483 U.S. at 873, concluding that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." *Ferguson,* 532 U.S. at 76 n.7.

At this stage in development of the doctrine, the "special needs" category is defined more by a list of examples than by a determinative set of criteria. Among the cases said by the Court to involve "special needs" are: a principal's search of a student's purse for drugs in school; a public employer's search of an employee's desk; a probation officer's warrantless search of a probationer's home; a Federal Railroad Administration regulation requiring employees to submit to blood and urine tests after major train accidents; drug testing of United States Customs Service employees applying for positions involving drug interdiction; schools' random drug testing of athletes; and drug testing of public school students participating in extracurricular activities.[10] The Supreme Court has not told us what, precisely, this set of cases has in common, but the cases seem to share at least these features: (1) an exercise of governmental authority distinct from that of mere law enforcement – such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; (2) lack of individualized suspicion of wrongdoing, and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing. It also appears significant that each of these cases involved extraction of consent through a threatened withholding of a benefit, rather than lack of consent. In *Griffin,* the convicted felon agreed to the terms of probation as a condition to release from incarceration; in *Skinner* and *Von Raab,* the employees agreed to drug testing as a condition of employment; in *Vernonia* and *Earls,* the students were forced to agree to the drug testing if they wished to participate in specified extracurricular activities.[11] This latter factor suggests that the "special needs doctrine" is a subspecies of the unconstitutional conditions doctrine. *See* Kathleen Sullivan, *Unconstitutional Conditions,* 102 Harv. L. Rev. 1413, 1433-42 (1989); Richard Epstein, *The Supreme Court, 1987 Term – Forward: Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 Harv. L. Rev. 4, 92-94 (1988); Kenneth W. Simmons, *Offers, Threats, and Unconstitutional Conditions,* 26 San Diego L.Rev. 289, 291-92 (1989).

---

[10] *See T.L.O.*, 469 U.S. at 341 ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administration for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause. . . . "); *O'Connor*, 480 U.S. at 725-26 ("[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigation of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."); *Griffin*, 483 U.S. at 873-74 ("A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."); *Skinner*, 489 U.S. at 620 ("The . . . interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.") (citations and internal quotations omitted); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (permitting drug testing by Customs Service because of critical safety concerns and because results were not made available to law enforcement); *Vernonia*, 515 U.S. at 657-58 (upholding uniform policy of suspicionless searches of student athletes); *Earls*, 122 S.Ct. at 2564 (holding that special needs "inhere in the public school context" thereby permitting drug testing of participants in extracurricular activities).

It is not clear, therefore, that the "special needs" doctrine has any place in this case. To be sure, the Head Start agency may have been exercising a form of *in loco parentis* authority; there was no individualized suspicion of wrongdoing and hence no stigma from being singled out for a search; and the stated purpose of the examinations was to promote the health and educational readiness of the children. On the other hand, the claim in this case involves lack of consent rather than compelled consent. According to the plaintiffs, CAP simply used its power over the children to conduct the examinations. Had CAP instead required the parents to consent to an unscheduled examination, on condition of not permitting their children to enroll in the Head Start program, this case would more closely resemble a classic "special needs" case.

---

[11] *T.L.O.* may be an exception, though it might be argued that students accept the locker searches as a condition of the benefits of a free public education. Alternatively, *T.L.O.* might better be analyzed as a holding that public school students do not have a reasonable expectation of privacy in their lockers, vis-a-vis school officials.

We need not resolve whether the "special needs" doctrine applies, however, because it is plain that, if performed without the necessary consent, the searches were unconstitutional even if we employ the "special needs" balancing test. The sole "special need" invoked by CAP, and accepted by the district court, was "the 'special need' that the physical examination of a child, 'done in order to comply with federal regulations, is an effective means of identifying physical and developmental impediments in children prior to them starting school, a goal of Head Start. . . . " Order of Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 7, App. 198 (ellipses in original). The district court found that this qualified as a "special need" because "CAP is bound to follow the Head Start regulations and those regulations require a health determination for each child. . . . [I]t is clearly impracticable to demand adherence to the traditional warrant and probable cause requirements considering the number of children dealt with by the Head Start program." *Id.*

We cannot agree with this logic. While it is certainly true that a properly conducted physical examination is "an effective means of identifying physical and developmental impediments in children," this supplies no justification for proceeding without parental notice and consent. The premise of the "special needs" doctrine is that these are cases in which compliance with ordinary Fourth Amendment requirements would be "impracticable." *Earls,* 122 S.Ct. at 2564, *quoting Griffin,* 483 U.S. at 873. There is no reason, however, to think that parental notice and consent is "impracticable" in this context. On the contrary, CAP claims to adhere to a policy of obtaining parental consent and providing advance notice to the parents so that they can be present at the examination. The failure to do so in this case appears to be a product of sloppy draftsmanship (with respect to consent forms) and carelessness (with respect to notice), rather than to any inherent "impracticability" of compliance with ordinary Fourth Amendment norms. [12]

Nor does compliance with Head Start regulations excuse CAP's failure to obtain parental consent. On the contrary, the regulations expressly require Head Start grantees to "obtain advance parent or guardian authorization" for "all health and developmental procedures administered through the program." 45 C.F.R. § 1304.20(e)(2). Contrary to CAP's interpretation, the regulations do not require them to obtain a physical examination within 90 days of enrollment. The regulations require Head Start grantees, within 90 days of enrollment, to "make a determination" as to whether enrolled children have an "ongoing source of continuous, accessible health care" and whether they are "up-to-date on a schedule of appropriate preventive and primary health care." 45 C.F.R. § 1304.20(a)(1)(i), (ii). If the children are lacking in these respects, it is an obligation of the Head Start grantee to "assist the parents in making the necessary arrangements." *Id.*, § 1304.20(a)(1)(ii)(A). It is not the place of a Head Start agency to usurp the parental role. Indeed, to schedule medical examinations without the knowledge of the parents would thwart the purpose of the regulations. Examinations performed on the children without parental participation could not reveal whether they had access to ongoing medical care or whether they were up to date on a schedule of preventive and primary health care. To make those "determinations," the agency has to communicate with the parents and with the children's regular doctors.

---

[12] The other possible explanation is that, contrary to CAP's protestations, the examinations were for the purpose of detecting child abuse, and that CAP deliberately obfuscated the consent forms and deliberately failed to provide notice so that parents would not interfere. That possibility would raise Fourth Amendment issues of a different order.

For these reasons, we conclude that the "special needs doctrine" would not excuse the failure to obtain parental consent for the examinations. We turn now to the defenses put forward by each of the appellees.

C. Defenses

1. *CAP Is Not Entitled As a Matter of Law To Immunity Under the* **Monell** *Doctrine.*

CAP argues that it is entitled to immunity from liability under the rule of *Monell v. New York City Dep't of Social Services,* 436 U.S. 658 (1978). In *Monell,* the Supreme Court held that a municipality cannot be held liable under 42 U.S.C. § 1983 merely on account of the unauthorized acts of its agents. To be liable, the municipality must have had an "official municipal policy of some nature," *id.* at 691, that was the "direct cause" or "moving force" behind the constitutional violations. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 820 (1985); *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-85 (1986) (finding municipal liability even when the "policy" was evinced by a single incident). In reliance on this line of cases, the district court held that CAP cannot be held liable for the plaintiffs' constitutional claims "assuming arguendo a violation occurred." The district court explained:

> When the execution of a government's policy or custom deprives or violates the constitutional rights complained of by a plaintiff, the governmental entity may be responsible for the injury under § 1983 [citing *Monell*]. . . . Isolated, unprecedented incidents are insufficient to create municipal liability. No evidence has been presented of a pattern of conduct by CAP. A municipal policy or practice must be the "direct cause" or "moving force" behind the constitutional violation [citing *Tuttle*]. Jerome Lee, Director of CAP's Head Start program, states in his affidavit that "It is CAP's policy that all examinations be conducted with parental consent." No evidence has been presented raising a genuine issue of material fact on this point. Again, the Court is persuaded summary judgment is appropriate as to the constitutional claims.

Order of Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 14-15, App. 205-6 (some citations omitted). We do not agree.

Although the Supreme Court's interpretation of § 1983 in *Monell* applied to municipal governments and not to private entities acting under color of state law,[13] caselaw from this and other circuits has extended the *Monell* doctrine to private § 1983 defendants. *Dickerson v. Leavitt Rentals,* 995 F.Supp. 1242, 1247 (D. Kan. 1998), *aff'd.* 153 F.3d 726 (10th Cir. 1998), *cert. denied,* 525 U.S. 1110 (1999); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.,* 844 F.2d 714, 722-23 (10th Cir. 1988); *see also Jackson v. Illinois Medi-Car Inc.,* 300 F.3d 760, 766 (7th Cir. 2002); *Burke v. North Dakota Dep't of Corr. & Rehab.,* 294 F.3d 1043, 1044 (8th Cir. 2002); *Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 729 (4th Cir. 1999); *Harvey v. Harvey,* 949 F.2d 1127, 1129-30 (11th Cir. 1992); *Rojas v. Alexander's Dep't Store,* 924 F.2d 406, 408-09 (2d Cir. 1990). Therefore, a private actor "cannot be held liable *solely* because it employs a tortfeasor – or, in other words . . . cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell,* 436 U.S. at 691.

That principle, however, does not entitle CAP to summary judgment in this case, because CAP's alleged liability is direct, not vicarious. The constitutional violation alleged in this case is the performance of medical examinations on Head Start children on the basis of forms that would not be understood by a typical reasonable person as constituting parental consent. CAP drafted those forms and has defended their use, claiming that the forms were sufficient to manifest consent. That certainly constitutes evidence sufficient to demonstrate that the conduct complained of was the policy and practice of CAP.[14] To be sure, as the district court pointed out, CAP officials aver that they have a policy of obtaining parental consent before arranging examinations, but the trier of fact could conclude that by "parental consent," CAP means something less than the knowing and genuine consent required by the Fourth Amendment. The plaintiffs' evidence supports the conclusion that, by arranging the examinations without consent, CAP directly violated the children's Fourth Amendment rights. The district court's grant of summary judgment on this ground is therefore reversed as to CAP, and the case is remanded for further proceedings.

---

[13] As a state and federal grantee, acting for the government in carrying out a government program in accordance with government regulations, CAP does not challenge its status as a person "acting under color of state law." *See Milo v. Cushing Mun. Hosp.,* 861 F.2d 1194, 1196-97 (10th Cir. 1988) (finding private corporation which managed hospital liable as a state actor because liability ran with delegation of authority); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.,* 844 F.2d 714, 720-23 (10th Cir. 1988) (holding that private party acting in accordance with duties imposed by government contract, when sued solely on basis of those acts dictated by government, is implicitly subject to liability but able to raise qualified immunity defense).

2. *Appellee KD Was Entitled to Summary Judgment Because It Did Not Participate Directly in the Examinations*

The trial court granted summary judgment to KD, the entity that CAP has contracted with to provide the educational component of the Tulsa Head Start program, on the grounds that the examinations did not violate the Fourth Amendment and that KD was not a state actor. Order of Granting KD's Motion for Summary Judgment, dated May 16, 2001 at 1-2, App. 178-9. We affirm the grant of summary judgement for KD on the alternative ground that there is no evidence that KD directly participated in the challenged conduct. *See United States v. Corral,* 970 F.2d 719, 726 n. 5 (10th Cir. 1992) (holding that appellate court may affirm for any reason supported by the law and record). KD was responsible for the educational component of the Head Start program. KD had no role in performance of the examinations or in arranging for notice and consent. To the extent that any KD personnel had an incidental role in facilitating the examinations, KD was entitled to rely on CAP's representations that parental consent had been obtained. Accordingly, the district court's grant of summary judgment to KD is affirmed.

---

[14] We note, also, that evidence in the record points to similar examinations performed pursuant to the same defective consent forms at CAP's Head Start program at Wiley Post Elementary School. This is further evidence that the occurrence at Roosevelt Elementary was not an isolated incident.

3. The County Health Department and the Nurses Were Entitled to Summary Judgment Because They Reasonably Relied on CAP's Representation That Parental Consent Had Been Obtained

The district court also granted summary judgment to the County Health Department and to nurses Baker and Strayhorn, on the ground that it was objectively reasonable for them to believe that the parents had given consent to the examinations. As discussed above, the standard for measuring "objective reasonableness" in determining the scope of consent is what a "typical reasonable person [would] have understood by the exchange." *Jimeno,* 500

U.S. at 251 (citations omitted). Here, the record demonstrates that the County Health Department and the nurses were objectively reasonable in believing that they had been given consent to examine the children. CAP told the County Health Department that CAP would obtain consent for the examinations before the County Health Department personnel conducted the exams. Nurses Baker and Strayhorn relied on this information. In addition, when they questioned CAP employee, Peggy Terry, about the consent forms, she told them that she had consent forms on file. Given these exchanges, it was objectively reasonable for the County Health Department and nurses Baker and Strayhorn to conclude that CAP had obtained the requisite consent for the examinations. The district court's granting of summary judgment to the County Health Department, Baker, and Strayhorn on this ground is therefore affirmed.[15]

III. State Common Law Claims

A. Intentional Infliction of Emotional Distress

The district court granted summary judgment to all defendants on the claim for intentional infliction of emotional distress, also known in Oklahoma as the tort of outrage. *See Breeden v. League Services Corp.*, 575 P.2d 1374, 1376-77 (Okla. 1978) (discussing intentional infliction of emotional distress/outrage and adopting standard from *Restatement (Second) of Torts* § 46). Under Oklahoma law, a claim for intentional infliction of emotional distress requires a showing of conduct

---

[15] The district court granted Baker and Strayhorn's motions to dismiss based on qualified immunity grounds. However, as explained in text, there is no need to reach the issue of qualified immunity because the nurses were objectively reasonable in believing that CAP had obtained consent. *See, e.g., United States v. Corral,* 970 F.2d 719, 726 n. 5 (10th Cir.1992) (holding in case not affirming on immunity grounds that appellate court may affirm for any reason supported by the law and record). Nor is it necessary to decide whether the County Health Department has immunity for the state law tort claims under 51 O.S. § 152.1(A).

> so outrageous in character, and so extreme in degree, as to be beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Frank v. Mayberry, 985 P.2d 733, 776 (Okla. 1999) (quoting *Restatement (Second) of Torts* § 46, cmt. d).

The district court granted summary judgment on this claim because, among other things, the plaintiffs' own expert opined that the examinations did not go beyond the reasonable bounds of standard well-child examinations. Although we have reversed the district court's grant of summary judgment with regard to CAP's actions under the Fourth Amendment, we agree with the district court that there is nothing in the record to suggest that Appellees' actions rise to the level of extreme outrageousness required for liability on a claim of intentional infliction of emotional distress or outrage. The district court's disposition of this claim is therefore affirmed.

B. Negligent Infliction of Emotional Distress/ Negligence.

Under Oklahoma law, the negligent act of causing emotional distress is not an independent tort but rather arises under the more general tort of negligence. *Lockhart v. Loosen,* 943 P.2d 1074, 1081 (Okla. 1997). Oklahoma does not allow recovery for negligently inflicted mental distress alone. *Richardson v. J.C. Penney Co., Inc.,* 649 P.2d 565, 566 (Okla. Ct. App. 1982). In order to recover on such a claim, the alleged mental distress must be "connected to some manifestation of physical suffering to the plaintiff. . . . " *McMeakin v. Roofing & Sheet Metal Supply Co. of Tulsa,* 807 P.2d 288, 290 (Okla. Ct. App. 1990). As evidence of physical injury in this case, the plaintiffs noted the lance inflicted upon the children to draw the blood and the removal of the children's clothing. No other ongoing trauma is alleged or argued. The district court found that imposing liability on such alleged trauma would subject medical personnel to excessive liability under the tort of negligent infliction of emotional distress/negligence. We have found no case suggesting that such injuries are sufficient to support a negligent infliction of emotional distress claim, and we therefore agree with the district court, and affirm its decision.

C. Assault/Battery

The Amended Complaint alleged both assault and battery claims. All defendants were granted summary judgment on these claims. While the plaintiffs have pursued their battery claim to some extent, they have failed to brief the issue of assault. This Court has held that "issues will be deemed waived if they are not adequately briefed" on appeal. *Utahns for Better Transp.,* 305

F.3d at 1175, *citing Phillips,* 956 F.2d at 954 (deeming such claims "waived under the general rule that even issues designated for review are lost if they are not actually argued in the party's brief"). Accordingly, there is no need to review the district court's decision on the assault claim on the merits. *See Murrell,* 43 F.3d at 1389 n.2.

Under Oklahoma law, in order to establish a claim of battery, a plaintiff must prove that: 1) a defendant, without consent, acted either with the intent of making a harmful or offensive contact with the plaintiff or with the intent of putting the plaintiff in apprehension of such a contact; and 2) the defendant's act resulted in a harmful or offensive contact with the plaintiff. *See* OUJI Civ. Inst. 19.6. If medical treatment is unauthorized and performed without consent, the result is a "technical battery." *Rosson v. Coburn,* 876 P.2d 731, 734 (Okla. Ct. App. 1994); *see also Scott v. Bradford,* 606 P.2d 554, 557 (Okla. 1980); *Rolater v. Strain,* 137 P. 96, 97 (Okla. 1913). "A 'technical battery' occurs when a physician, in the course of treatment, exceeds the consent given by the patient." *Rosson,* 876 P.2d at 734 n.6 *quoting Black's Law Dictionary* at 153 (6th ed. 1990).

"Consent," for tort liability purposes, "is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor." *Restatement (Second) of Torts* § 892(1). "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." *Id.* at § 892(2). Consent can also be either "apparent" or found to be implied by "custom." *Id.* at cmts. c, d. "Apparent consent" is present when "the words or acts or silence and inaction [of the aggrieved party] would be understood by a reasonable person as intended to indicate consent and they are in fact so understood by the other." *Id.,* cmt. c. "In determining whether conduct would be understood by a reasonable person as indicating consent, the customs of the community are to be taken into account." *Id.,* cmt. d.

The district court found no battery present in this case because it "found no decision in which a recognized procedure performed in the standard manner in a physical examination constitutes a harmful or offensive touching. . . . " Order Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 16, App. 207. It seems that the district court came to this conclusion after considering that the plaintiffs' expert said that the exam was in conformity to well-child exams. The district court was correct in this conclusion. However, this analysis ignores the fact that under Oklahoma law a technical battery occurs when medical personnel treat patients without consent. Presumably, what makes such contact "offensive" for purposes of liability for technical battery is the fact that the procedure is performed without consent.

As discussed above, both County Health Department and nurses Strayhorn and Baker were assured by CAP that proper consent had been obtained for the examinations. Strayhorn and Baker were assured by Peggy Terry that the proper consent forms were on file. "Consent" in the legal sense is present as to these defendants because, according to undisputed evidence in this case, it is the custom of the industry to rely on assurances from other health care professionals that proper consent has been obtained. The testimony of the plaintiffs' expert, advanced as a specialist in customs of the industry, supports this conclusion. The expert was asked "can you . . . agree that if you are informed that there are signed consent forms of the parents, that under that scenario, it is reasonable to proceed?"; he replied: "Yeah. I think there's a bit of a problem when you, you know, are an outside provider of services." This testimony demonstrates that it is customary to rely on such consent. Therefore, Baker and Strayhorn committed no battery because they had legal consent by custom, thus negating a claim for technical battery. The district court's disposition of the battery claim against the nurses is therefore affirmed.

The district court granted summary judgment to CAP on the battery claim on the ground that CAP had consent to arrange the examinations and that the examinations themselves did not deviate from the industry standard of care. ORDER of Granting CAP's Motion for Summary Judgment, dated May 16, 2001 at 16-7, App. 207-8. As discussed above, however, the plaintiffs have submitted sufficient evidence to withstand a motion for summary judgment regarding whether CAP had objectively reasonable grounds to believe that it had consent to authorize the examinations. For the same reason, summary judgment must be reversed with respect to CAP's alleged technical battery under Oklahoma law.

D. Invasion of Privacy

The plaintiffs' invasion of privacy is based on a theory of intrusion upon seclusion, one of the four branches of the tort of invasion of privacy. *See generally Restatement (Second) of Torts* §§ 652A-E (describing four branches of invasion of privacy tort); Warren & Brandeis, *The Right of Privacy,* 4 Harv. L. Rev. 193 (1980) (describing common law foundation for invasion of privacy tort); William L. Prosser, *Privacy,* 48 Cal. L. Rev. 383 (1960) (describing four branches of privacy tort). The Oklahoma Supreme Court has held that there are two necessary elements to an intrusion upon seclusion claim: 1) a nonconsensual intrusion, 2) which is highly offensive to a reasonable person. *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 366 (Okla. 1994).

As to the first of these elements, we have already determined that the plaintiffs have presented evidence supporting lack of consent. As to the second, basing its conclusion on the fact that the Plaintiffs' own medical expert concluded the examinations did not deviate from the standards for a well-child examination, the district court held that the "intrusion" in this case would not be highly offensive to a reasonable person. Order Granting CAP's motion for Summary Judgment, dated May 16, 2001 at 17, App. 208. We have found no Oklahoma precedent that leads us to conclude that what is "offensive to the reasonable person" depends upon whether the examination complied with standards for a well-child examination, rather than an evaluation of the time, place, manner, and substance of the examination. Such a determination of reasonableness is classically reserved for resolution by the trier of fact. Thus, on both of these points, we must remand for determination of possible liability as to CAP.

Because the district court found that the intrusion was consensual and not offensive as a matter of law, it did not address the further element set forth in the language of the Restatement, which Oklahoma has adopted, regarding intent. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Munley v. ISC*

Fin. House, Inc., 584 P.2d 1336, 1339-40 (Okla. 1978) (quoting *Restatement (Second) of Torts* § 652B and explicitly adopting standard). Cases from other circuits that directly address the issue of intent explain that "[a]n intrusion occurs when an actor 'believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act.'" *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 876 (8th Cir. 2000) (quoting *O'Donnell v. United States,* 891 F.2d 1079, 1083 (3d Cir. 1989)). This analysis originates in an interpretation of Pennsylvania law, but we find its analysis of Restatement sections 652B and 8A persuasive and we believe the Oklahoma Supreme Court would as well. Thus, on remand, CAP's intent under this standard will need to be addressed.

As discussed above, however, based on industry custom it was reasonable for the nurses and the County Health Department to believe that they had consent to perform the examinations. As a result, under the facts here, the nurses and the County Health Department lacked the requisite intent as a matter of law for liability under a theory of intrusion upon seclusion. The district court's judgment for nurses Baker and Strayhorn and the County Health Department on the invasion of privacy claim is therefore affirmed. The district court's disposition of this claim as to CAP is reversed and remanded for a determination of whether the intrusion was nonconsensual, whether CAP's actions were highly offensive to a reasonable person, and whether CAP acted with the requisite intent, such that it should be liable for intrusion upon seclusion.

E. Medical Malpractice/Negligence

The trial court correctly determined that, as a general matter, medical malpractice encompasses the breach of a duty which a physician, by virtue of his or her relationship to the patient, owes to exercise reasonable care in treatment. Order Granting County Health Department's Motion for Summary Judgment, dated May 16, 2001, at 4, App. 190, *citing Daniels v. Gilbreath,* 668 F.2d 477, 488 (10th Cir. 1982). A physician-patient relationship is essential to a medical malpractice action. *See generally Greenberg v. Perkins,* 845 P.2d 530, 534-36 (Colo. 1993) (*en banc*) (surveying and collecting state and federal cases so holding); *cf. Johnson v. Fine,* 45 P.3d 441, 445 (Okla. Ct. App. 2002) (declining to extend malpractice actions beyond the immediate doctor-patient relationship). On appeal, the plaintiffs do not challenge the district court's dismissal of this claim as to CAP.

With regard to the conduct of the nurses in this case the existence of a physician-patient relationship is immaterial because, as the plaintiffs' own expert points out, neither Strayhorn nor Baker deviated from the requisite standard of care. The examinations conformed to standards for well-child examinations and, as discussed above, they followed customary industry practices in relying on the representations of CAP that consent for the examinations had been given. It is true that the plaintiffs' expert testified that the consent forms themselves were insufficient, but this does not change the fact that Baker, Strayhorn, and the County Health Department were acting reasonably and within the norms of industry practice when they relied upon CAP's representations. The district court's decision regarding medical malpractice/negligence is therefore affirmed.

IV. Costs

In granting summary judgment in favor of the defendants below, the district court ordered the plaintiffs to pay costs. While it may sometimes be appropriate to award costs against low-income plaintiffs bringing a suit under the civil rights laws, this should be done with caution. Since we now reverse the grant of summary judgment in substantial part, that order must also be reversed and the issue of costs remanded to the district court. *See Delano v. Kitch,* 663 F.2d 990, 1001 (10th Cir. 1981); *Amarel v. Connell,* 102 F.3d 1494, 1523 (9th Cir. 1996) (citing *Farmer v. Arabian American Oil Co.,* 379 U.S. 227 (1964)).

Conclusion

For the reasons set forth above, we affirm the trial court's dismissal or grant of summary judgment on all claims with the following exceptions. First, we reverse the trial court's grant of summary judgment to CAP on the Fourth Amendment, technical battery, and invasion of privacy claims. We also reverse the trial court's dismissal of the parents' Fourteenth Amendment claim against CAP regarding interference with their constitutional right to direct and control the medical treatment of their children. We reverse the district court's award of costs as well, and remand the case to the district court for proceedings consistent with this decision.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK DUBBS, et al.,)
Plaintiffs,)
)
v.) Case No. 99-CV-732-K(E)
HEAD START, INC., et al.,)
)
Defendants.)

ORDER

(Filed May 16, 2001)

Before the Court is the Motion for Summary Judgment (# 167) of Defendant Community Action Project of Tulsa County, Oklahoma (CAP).

BACKGROUND

Plaintiffs' allegations stem from the physical examinations of minor children, who were participants in the Head Start Program at Roosevelt Elementary School. Head Start is a federally-funded program that provides educational and social services to low-income families and their children. Head Start Act, 42 U.S.C. §§ 9831 et seq. Plaintiffs consist of these children (Minor Plaintiffs) and their parents (Parent Plaintiffs). Plaintiffs allege that on November 5, 1998, the children were stripped of their outer clothing and subjected to a physical examination, including a survey of their genitals and the taking of a blood sample, without informed written parental consent. Plaintiffs have sued under multiple causes of action the various entities involved in the Head Start Program at Roosevelt Elementary School, including CAP, as well as the individuals allegedly involved in the examinations. CAP is the not-for-profit organization overseeing the Head Start program in Tulsa during the events alleged. It is a "Head Start grantee" as defined by the regulations, i.e., an agency whose application to operate a Head Start program has been approved by the responsible HHS official. 45 C.F.R. §1302.2.

Plaintiffs alleged the following federal causes of action under 42 U.S.C. § 1983: unreasonable search and seizure in violation of the Minor Plaintiffs' Fourth and Fourteenth Amendment rights; lack of substantive due process by interfering with the right to privacy in violation of U.S. Constitution articles I and IV, § 2, clause 1.1; and amendments I, IV, IX, and XIV; and interference with Parent Plaintiffs' parental liberty rights in violation of U.S. Const. art. IV, § 2, cl. 1.1 and amends. I, IX, and XIV. Plaintiffs also alleged a conspiracy to deprive them of equal protection of the laws under 42 U.S.C. §§ 1985 and 1986. Finally, Plaintiffs asserted various state common-law and constitutional claims, including unreasonable search and seizure in violation of Okla. Const. art. 2, § 30; interference with parental liberty rights under Okla. Const. art. 1, §§ 1 and 2, art. 2, §§ 2 and 30; assault; battery; invasion of privacy; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence and gross negligence; and medical malpractice.

Plaintiffs' claims for lack of substantive due process and conspiracy to deny them equal protection of or equal privileges and immunities under the law were dismissed by this Court in an Order entered on July 11, 2000.

APPLICABLE STANDARD

Summary judgment is appropriate if the court reviews all of the submitted evidence and concludes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Court views such evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *Byers v. City of Albuquerque,* 150 F.3d 1271, 1274 (10th Cir. 1998).

Discussion

The governing regulations require a grantee agency, no later than 90 calendar days from the child's entry into the program, to obtain from a health care professional a "determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care which includes medical, dental and mental health." 45 C.F.R. §1304.20(a)(1)(ii). In interpreting these regulations, the United States Department of Health and Human Services has established Performance Standards, which are interpretive guidelines. These Performance Standards were provided to CAP by the regional Department of Health and Human Services office. The Performance Standards applicable to 45 C.F.R. §1304.20(a)(1)(ii) provide in pertinent part that one role of the Head Start staff is to ensure that healthcare professionals have provided diagnostic testing and treatment, as needed. Agencies may also, working in collaboration with parents, arrange for staff from the local health department or health providers to come to the agency to provide services, in recognition that some parents may have difficulty taking children to medical or dental appointments. (*See* Exhibit A to CAP's supplemental brief).

45 C.F.R. §1304.20(a)(1)(ii) expressly provides that the schedule of preventive and primary health care must incorporate the requirements utilized by the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program of the Medicaid agency of the State in which they operate. Those standards provide for a "complete physical assessment", which includes an examination of "each body system", including genitalia. (*See* Exhibit B to CAD's supplemental brief).

The first step regarding a §1983 claim is to identify the specific constitutional right allegedly infringed. *Morgan v. Gertz,* 166 F.3d 1307, 1309 (10th Cir.1999). Here, plaintiffs contend the Minor Plaintiffs were subjected to an unreasonable search and seizure in violation of the Fourth Amendment and the Parent Plaintiffs' parental liberty interest protected by the Fourteenth Amendment has been violated.

Defendant initially attacks the Fourth Amendment claim at its most basic level, arguing that the constitutional provision is not even implicated by the conduct under review. The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . " U.S. Const. amend. IV. This constitutional safeguard is limited to government conduct which can reasonably be said to constitute a "search" or a "seizure" within the meaning of the Fourth Amendment. *United States v. Attson,* 900 F.2d 1427, 1429 (9th Cir.), *cert. denied,* 498 U.S. 961 (1990). The court in *Attson* ruled a government-employed doctor who drew a blood sample for medical reasons had not performed a "search" or "seizure" in violation of the Fourth Amendment. The Ninth Circuit stated the record did not reflect the doctor intended to elicit a benefit for the government in its investigative or administrative capacity and rather acted for a reason entirely independent of the government's intent to collect evidence for use in the defendant's prosecution. *Id.* at 1433.

In *Kia P. v. McIntyre,* 2 F.Supp.2d 281 (E.D.N.Y.1998), *aff'd,* 235 F.3d 749 (2d Cir.2000), the district court held that a urine test given for medical and not investigative purposes did not constitute a "search" under the Fourth Amendment. CAP asserts the examinations in the present case were conducted for medical, rather than investigatory purposes, in accordance with the Head Start regulations. Therefore, CAP argues, no "search" or "seizure" took place.

The Court is not persuaded summary judgment should be granted on this basis. In its initial summary judgment brief, CAP stated authoritatively "[t]he evidence here directly refutes any suggestion that child abuse was even a consideration of the exam." (CAP's summary judgment brief at 12). Similar assertions are made on page 13 of the brief. In their brief responding to CAP's motion, plaintiffs state "[a]ccording to Misti Dubbs, Peggy Terry of CAP stated they were looking for signs of abuse." (Plaintiffs' response brief at 13). On one of the cited deposition pages, Misti Dubbs[1] testifies that, based upon what "Peggy" told her, it was Misti Dubbs' understanding that determination of child abuse was "the goal" and the "only purpose" of the exam. (Exhibit H to plaintiffs' response brief at 72).

---

[1] Misti Dubbs is the stepmother of Minor Plaintiff Tiffani Dubbs and is a teachers' aide at the Roosevelt site.

CAP's reply brief does not address this testimony. In its supplemental brief filed March 30, 2001 at the Court's direction, CAP again states "there is no evidence that the physical examinations constituted a "search" within the context of the Fourth Amendment." (#252 at 13 n.1). In CAP's response to plaintiffs' supplemental brief, filed April 19, 2001 again at the Court's direction, CAP once again asserts "there is no evidence that the purpose of the physicals was for any other purpose than to ensure that the Plaintiff children could participate in Head Start and that they were developing at an age-appropriate level." (#260 at 7).

The Court disagrees, viewing the evidence in the light most favorable to plaintiffs. CAP does not explain how the deposition testimony of Misti Dubbs is properly characterized as "no evidence". In its most recent brief, CAP points to testimony of Jackie Strayhorn and Kim Baker, identified as "the medical professionals who conducted the examinations in this case," that detection of child abuse was not the purpose of the examinations and child abuse would be implicated only to the extent that signs of it were detected as part of determining the child's overall health status. Under the present record, this merely demonstrates a factual issue to be resolved by a jury. In the Court's view, the record is not clear enough to find as a matter of law no "search" was conducted. Dubbs' recitation of the Terry statement, apparently admissible as an admission by party-opponent under Rule 801(d)(2) F.R.Evid., exists in the record. Credibility determinations and weighing the evidence are jury functions. *First Sec. Bank of New Mexico v. Pan Amer. Bank,* 215 F.3d 1147, 1154 (10th Cir.2000). Summary judgment is inappropriate on this ground.

Assuming arguendo the physical examinations constitute "searches" within the Fourth Amendment, a new stage of the analysis is entered. CAP argues, and plaintiffs have not challenged, the application of the "special needs" doctrine. The Supreme Court has held that "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing," except in cases of "special need" based on "concerns other than crime detection." *Chandler v. Miller,* 520 U.S. 305, 313-14 (1997). Under the special needs doctrine, the Court identifies a special need which makes impracticable adherence to the warrant and probable cause requirements, then balances the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes. *Earls v. Bd. of Educ. of Tecumseh Public School Dist,* 242 F.3d 1264, 1269 (10th Cir.2001).

In the present case, CAP asserts as the "special need" that the physical examination of a child, "done in order to comply with federal regulations, is an effective means of identifying physical and developmental impediments in children prior to them starting school, a goal of Head Start. . . . " Again, plaintiffs have presented no argument that this assertion should not be accepted as a "special need". Upon review, the Court finds that it should be. CAP is bound to follow the Head Start regulations and those regulations require a health determination for each child. Even assuming arguendo that a subsidiary or peripheral effect of the examinations might be the discovery of child abuse, it is clearly impracticable to demand adherence to the traditional warrant and probable cause requirements considering the number of children dealt with by the Head Start program.

Accordingly, the Court next moves to the balancing test. Under a "special needs" analysis, the government need not show probable cause or even individualized suspicion for its search. Instead, it must prove that its search meets a general test of "reasonableness." *Wilcher v. City of Wilmington,* 139 F.3d 366, 373-74 (3rd Cir.1998). The factors developed by Supreme Court jurisprudence, primarily in the area of employee drug tests, are (1) the nature of the privacy interest upon which the search intrudes; (2) the extent to which the search intrudes on the individual's privacy; and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means employed by the government for meeting that concern. *Id.* at 374.

Clearly, the genital area is one in which an individual possesses a legitimate expectation of privacy. However, the Supreme Court has held that students generally enjoy a lesser expectation of privacy than the public at large. *Veronia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995). While it appears no published decision has addressed this issue regarding children in the Head Start program, the analogy between participation in a governmental program and participation in school seems a reasonable one.

Turning to the character of the government's search and the extent to which it intrudes on the individual's privacy, the degree of intrusion depends upon the manner in which the search is conducted and monitored. *Id.* at 658. It has not been disputed that a genital examination is a standard procedure in any well-child examination of any three or four year old child. Further, plaintiffs' own expert finds no fault with the examinations as conducted. No evidence has been presented that a child's genitals were gratuitously exposed or seen by anyone other than the medical professional. In *Wilcher* firefighters complained of the "direct observation" method of urine collection, in which a testing employee is present in the room during collection to avoid possible tampering. The appellate court affirmed the district court's factual finding that the monitors' intent was direct observation of the urine collection process in general and not the intentional observation of the firefighters' genitalia. 139 F.3d at 375. The district court found that whatever observation of the genital area which had taken place was only a byproduct of the general observation of the donor. *Id.* at 371. In the case at bar, the genital examinations and blood tests were accepted portions of the required medical examination, and were conducted in a professional manner.

Finally, the Court finds the nature of the governmental concern to be compelling and relatively immediate. The Head Start regulations require a health determination to be made within ninety days of enrollment, and specifically contemplate a genital examination and blood test. Nothing in the record indicates the method chosen by CAP in this case was not an efficacious means to meet that concern. Thus, even assuming these medical examinations constitute "searches" under the Fourth Amendment, the Court finds they were "reasonable."

The parties, at the Court's urging, have devoted large amounts of their briefs to the issue of consent. Parent Plaintiffs have asserted the information they were provided and the consent forms which they signed did not provide sufficient information, particularly as to a genital examination. The Court has requested (and the parties have more than adequately complied with the request) supplemental briefing in the interest of a thorough ruling in this important case.

It should be remembered "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). What a citizen is assured by the Fourth Amendment is not that no government search of his house will occur unless he consents, but that no search will occur that is "unreasonable." *Illinois v. Rodriguez,* 497 U.S. 177, 183 (1990). When a claim of "apparent consent" is raised, what is at issue is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated. *Id.* at 187.

If the circumstances are such that a reasonable person would doubt a given representation, the officers cannot reasonably act upon that representation without further inquiry. *Id.* at 188-89. But the constitutional requirement is that they have a basis for a reasonable belief as to the operative facts, not that they acquire all available information or that those facts exist. *Id.* at 185-86.

Parent Plaintiffs concede a consent to a physical examination, but deny they consented to a genital examination. In plaintiffs' supplemental brief they state "[t]he Parent Consent Form only lists specific procedures consented to" and "[a]nything not listed cannot have been consented to." (Plaintiffs' Supplemental Brief at 4). However, the Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to conduct the search that was undertaken. *Jimeno*, 500 U.S. at 249. The ultimate question is whether the officer had a reasonable basis for believing that there had been consent to search. *United States v. Garcia,* 56 F.3d 418, 423 (2nd Cir.1995). There is no Fourth Amendment violation if an officer has an objectively reasonable, though mistaken, good-faith belief that he has obtained a valid consent to search the area. *Rodriguez,* 497 U.S. 177, 186 (1990).

The record reflects, in pertinent part, three different medical forms utilized by Head Start in this case: (1) a "Form 3" provided to each parent at the time of enrollment, to be completed by a medical professional; (2) a form titled "Parent Consent Form"; (3) a form titled "Authorization for Treatment to Minors". The Form 3 set forth all elements of the physical examination which was to be conducted, including a description on the face of the form of the systems that would be examined, which specifically included "genitalia". The other two forms were for parental signature.

As the Court has noted in previous Orders in this case, the consent forms are not models of draftsmanship. At one point in their supplemental brief, defendants assert the "Authorization for Treatment to Minors" form must be read in bifurcated fashion, the bottom half limited to emergency care and the top half not so limited. (Defendants' Supplemental Brief at 8). The language of the forms is ambiguous at times. For example, plaintiffs' expert Dr. Nelson testified that the "Authorization for Treatment to Minors" form is limited to *treatment,* as the title suggests. However, defendants point out that, in smaller print within the body of the form, it authorizes "*diagnosis* or treatment" (emphasis added), which more clearly suggests a routine physical examination. The forms utilized, as this litigation has brought home to CAP, could have been crafted more precisely. In other words, if the dispositive issue were whether Parent Plaintiffs gave a fully-informed consent to the specific procedures of genital examination and blood test, the Court would deny summary judgment based upon a genuine issue of material fact. The issue, instead, is whether CAP had an objectively reasonable, good-faith belief in the fact of consent and the scope of that consent. The Court concludes it did.

The Court finds that the forms provided the parents with sufficient notice that their children will be subject to examination and the "collect[ion]" of information in order to fulfill the health-related component of Head Start's mission. The Court takes notice of forms signed by Parent Plaintiffs for the following Minor Plaintiffs: Aguirre, Brown, Cowans, Crowley (only one of the two forms was located by the Court), Loftin, Porterfield and Suddarth. There does not appear to be any form for Minor Plaintiff Dubbs, but there is evidence that her step-mother, Misti Dubbs, was present at the examination. *See* Depo. of Misti Dubbs at 20-24. The presence of Misti Dubbs at her step-daughter's examination suffices as parental consent for the examination to commence. Thus, it can be said that the examinations of all of the Minor Plaintiffs in this case were conducted with a reasonable belief that parental consent had been properly obtained and the scope included genital examination and blood tests.

As previously stated, the Plaintiffs' principal concern appears to be that, even if they did provide consent to medical treatment for their children, they were never warned that such treatment could include blood testing or genital inspection. However, as the Plaintiffs' expert witness, Dr. Fredric Nelson, points out, genital inspections are a routine part of a physical examination of children this age. *See* Depo. of Dr. Frederic Nelson at 66 ("I do not fault at all the conduct of the examinations that they did.") Dr. Nelson's statement is supported by the testimony of the other experts from the medical field who were deposed by the parties in this case. *See* Depos. of Dr. Hugh Graham at 10 ("[u]sually one does" examine the genitalia of children in well-child examinations); Dr. Sylvia August at 7; Dr. Muhammad Suhail at 20. The Parent Plaintiffs all agree that "an offer of genital exams was not made clear," but Plaintiffs have not provided any authority or evidence – testimonial or otherwise – that genital exams are not a proper ingredient of a routine well-child physical examination. Without any evidence of this, the Court is not persuaded that a parent's consent to medical examinations would reasonably be interpreted not to include a genital-exam component. The Parent Plaintiffs entrusted their children to the Head Start program knowing its mission and consenting to medical treatment of their children.

The issue of blood sampling is also a principal concern of the Plaintiffs. Like genital exams, the taking of blood samples is a routine portion of a well-child examination. *See* Depo. of Dr. Nelson at 149. If a medical professional proceeds with a routine examination under the reasonable belief that consent has been properly obtained for such an examination, there can be no Fourth Amendment liability for his or her performance. In addition, there is testimony that the risk of taking blood samples such as the ones in issue here is not great enough to require consent separate from a parent's general consent to examine the child. *See* Depo. of Dr. Suhail at 41-42.

Plaintiffs assert the Form 3 might be relevant to notice, but is not relevant to consent. This would be correct if not for the fact that "the concept of knowing and intelligent waiver, which is strictly applied to rights involving a fair criminal trial, does not govern in the Fourth Amendment context." *Garcia,* 56 F.3d at 422. Plaintiffs have not demonstrated that defendants did not have an objectively reasonable belief that the Form 3 gave Parent Plaintiffs at least constructive notice that the medical examinations would involve the genitalia and a blood test. When a consent form was signed, defendants also had an objectively reasonable belief that consent had been given to a standard physical examination, in all aspects. The Court declines to hold that informed consent must be obtained as to each specific procedure to be conducted in what the medical community accepts as a proper examination for a child of this age[2]. Summary judgment is granted as to plaintiffs' Fourth Amendment claim.

Parent Plaintiffs also bring a constitutional claim on their own behalf. Parents have a fundamental liberty interest in the "care, custody, and management" of their children. *Hollingsworth v. Hill*, 110 F.3d 733, 738 (10th Cir.1997). Equally honored is the principle that parental consent must be secured before medical treatment is obtained. *Parents United v. School Dist. of Philadelphia,* 148 F.3d 260, 275 (3rd Cir.1998). As the Court has previously discussed, it finds CAP had an objectively reasonable belief that parental consent had been obtained. Thus, to the extent CAP was factually mistaken in its interpretation of the consent forms, this constitutes at most negligence. Liability under §1983 cannot be predicated upon negligence. *Woodward v. City of Worland,* 977 F.2d 1392,

---

[2] The United States Supreme Court recently referred to "informed consent" in a case implicating the "special needs" doctrine. *Ferguson v. City of Charleston,* 121 S.Ct. 1281, 1287 (2001). This Court agrees with defendants that the statement represents dicta and in any event involved a search having direct law enforcement involvement, which the case at bar does not. This Court must follow the law as it presently exists.

1399 (10th Cir.1992). The plaintiffs' Fourteenth Amendment claim fails as well.

An additional ground exists to dismiss plaintiffs' constitutional claims, assuming arguendo a violation occurred. When the execution of a government's policy or custom deprives or violates the constitutional rights complained of by a plaintiff, the governmental entity may be responsible for the injury under § 1983. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). The concept of municipal liability articulated in *Monell* applies to county governments and other local government units. *Id.* at 690 n.55. Isolated, unprecedented incidents are insufficient to create municipal liability. *Doe v. Broderick,* 225 F.3d 440, 456 (4th Cir.2000). No evidence has been presented of a pattern of conduct by CAP. A municipal policy or practice must be the "direct cause" or "moving force" behind the constitutional violation. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 820 (1985). Jerome Lee, Director of CAP's Head Start program, states in his affidavit that "It is CAP's policy that all examinations be conducted with parental consent." No evidence has been presented raising a genuine issue of material fact on this point. Again, the Court is persuaded summary judgment is appropriate as to the constitutional claims.

Having found the defendants' actions did not violate the United States Constitution, the Court finds no violation of the analogous provisions of the Oklahoma Constitution. *Cf. Sloan v. Sprouse,* 968 P.2d 1254, 1258 (Okla.Crim. App.1998). Moreover, plaintiffs have not cited any authority that those provisions of the Oklahoma Constitution permit a private cause of action for civil damages.

Turning to the state law claims[3], plaintiffs seek to recover for intentional infliction of emotional distress. This claim, also known as the tort of outrage under Oklahoma law, requires a showing of conduct so outrageous in character and so extreme in degree as to [sic] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Frank v. Mayberry,* 985 P.2d 773, 776 (Okla. 1999). The Court agrees with CAP that the evidence presented as to these medical examinations does not rise to, the requisite level. Plaintiffs' own experts have indicated that these were standard well-child examinations. Summary judgment is appropriate as to this claim as well.

Plaintiffs also seek recovery for negligent infliction of emotional distress. Under Oklahoma law, the negligent causing of emotional distress is not an independent tort, but is in effect the tort of negligence. *Lockhart v. Loosen,* 943 P.2d 1074, 1081 (Okla.1997). Oklahoma denies recovery for negligently inflicted mental distress alone. *Richardson v. J.C. Penney Co. Inc.,* 649 P.2d 565, 566 (Okla.Ct.App.1982). For recovery, mental distress must be connected to some manifestation of physical suffering to the plaintiff himself. *McMeakin v. Roofing & Sheet Metal Supply,* 807 P.2d 288, 290 (Okla.Ct.App.1990). As constituting physical injury in this case, plaintiffs point to the lancing of each child's fingertip and the removal of clothing. Adopting such a standard would subject medical personnel to excessive risk of liability. The Court declines to do so, and grants summary judgment.

---

[3] In view of the length of this litigation, the Court elects to exercise supplemental jurisdiction over the state law claims despite the dismissal of the federal claims.

Plaintiffs also assert claims of battery and negligence. The elements of battery under Oklahoma law require a harmful or offensive touching. Instruction No. 19.6, *Oklahoma Uniform Jury Instructions – Civil (Second Edition)*. The Court has found no decision in which a recognized procedure performed in the standard manner in a physical examination constitutes a harmful or offensive touching, and the Court declines to so find.

Further, if treatment is completely unauthorized and performed without any consent at all, there has been a battery. However, if the physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence for failure to inform the patient of his options, regardless of the due care exercised at treatment, assuming there is injury. *Scott v. Braddford,* 606 P.2d 554, 557 (Okla.1979). Here, consent was obtained, thus precluding a battery cause of action. Regarding any negligence or mistake as to the scope of informed consent, the Court reiterates plaintiffs have failed to prove any injury. The claims of battery and negligence fail as well.

Plaintiffs allege a cause of action for invasion of privacy. The only category of this tort which appears applicable is intrusion upon one's seclusion. The two elements to be proven are (1) a nonconsensual intrusion (2) which was highly offensive to a reasonable person. *Gilmore v. Enogex, Inc.,* 878 P.2d 360, 366 (Okla.1994). The Court reiterates it is not persuaded the performing of a medical examination in a standard manner would be found highly offensive to a reasonable person. An invasion of privacy claim does not properly lie either.

CONCLUSION

The Court concludes that, construing the evidence in the light most favorable to the non-movants, Plaintiffs have not demonstrated a violation of rights meriting relief. There is no evidence that the subject examinations were improperly conducted. There has been ample deposition testimony that no harm to Minor Plaintiffs resulted, physical or mental.

The Court understands the attitude of a parent to perceived "child abuse screening" but the evidence reflects the primary, if not sole, purpose of these examinations was medical diagnosis and to comply with Head Start regulations.[4] Instead, the Court is convinced, these examinations were proper and routine procedures which were carried out in a manner consistent with existing medical standards. The Court is further satisfied that while the parents of Minor Plaintiffs may not have been notified of each element of the physical examination immediately prior to its occurrence, the parents had consented to medical treatment for their children while they were in the care of those administering the Head Start Program at Roosevelt Elementary. CAP had a reasonable, good-faith belief that such consent encompassed the panoply of procedures in a standard well-child examination. In light of these findings, there are no genuine issues of material fact remaining for trial.

---

[4] The Court notes that medical professionals are required by Oklahoma statute to report any evidence of child abuse that they may encounter during a routine or similar examination. *See* 10 O.S. § 7103, 7104.

IT IS THEREFORE ORDERED that the motion for summary judgment filed by Defendant Tulsa Community Action Project (# 167) is hereby GRANTED.

ORDERED THIS 16 DAY OF MAY, 2001.

/s/ Terry C. Kern
TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK DUBBS, Individually,)
and as Father and Next)
Friend of TIFFANI DUBBS,)
a minor; FRANCISCO)
AGUIRRE, Individually,)
and as Father and Next)
Friend of JESSICA)
AGUIRRE, a minor; JOY)
BROWN, Individually, and)
as Mother and Next Friend)
of MARII BROWN, a minor;)
KEENYA COWANS,)
Individually, and as Mother)
and Next Friend of)
KEYMIYA COWANS, a)
minor; SHANIKA)
CROWLEY, Individually,) Case No.
and as Mother and Next) 99-CV-732-K (E)
Friend of KWANITA M.)
CROWLEY, a minor; LISA)
ANN DEERINWATER,)
Individually and as Mother)
and Next Friend of MARIA)
DEERINWATER, a minor;)
RAICHELLE LOFTIN,)
Individually, and as Mother)
and Next Friend of QUEN-)
TEN LOFTIN, a minor;)
STEPHANIE PEARSON,)
Individually and as Mother)
and Next Friend of)
KRISTEN PEARSON, a)
minor; ELISHA PORTER-)
FIELD, Individually, and as)

Mother and Next Friend of)
LAQUANTE PORTERFIELD, a minor; and)
DAPHINE SUDDARTH,)
Individually, and as)
Mother and Next Friend)
of RONISHA SUDDARTH,)
a minor,)
)
Plaintiffs,)
)
v.)
)
HEAD START, INC.; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA)
COUNTY, OKLAHOMA;)
COMMUNITY ACTION)
PROJECT OF TULSA)
COUNTY, OKLAHOMA;)
TULSA CITY-COUNTY)
HEALTH DEPARTMENT;)
KD ENTERPRISES, INC.;)
DOE, GOVERNMENT)
AGENTS 1 through 5;)
JACKIE STRAYHORN,)
ARNP; K. BAKER, R.N.;)
PEGGY DOE; JOHN DOES)
1 through 10; and JANE)
DOES 1 through 10,)
)
Defendants.)

JUDGMENT

(Filed May 16, 2001)

This matter came before the Court for consideration of the Defendants' motions for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Orders filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants Community Action Project of Tulsa County, Oklahoma, Jackie Strayhorn, Kim Baker, Tulsa City-County Health Department, Independent School District No. 1 of Tulsa County, and KD Enterprises, Inc., and against plaintiffs. As to the remaining named defendants, whether unserved or named as "Doe" defendants, this action is dismissed without prejudice.

ORDERED THIS 16 day of May, 2001.

/s/ Terry C. Kern
TERRY C. KERN, CHIEF
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JACK DUBBS, Individually, and as father and next friend of Tiffani Dubbs, a minor; FRANCISCO AGUIRRE, Individually, and as father and next friend of Jessica Aguirre, a minor; JOY BROWN, Individually, and as mother and next friend of Marii Brown, a minor; KEENYA COWANS, Individually, and as mother and next friend of Keymiya Cowans, a minor; SHANIKA CROWLEY, Individually, and as mother and next friend of Kwanita M. Crowley, a minor; RAICHELLE LOFTIN, Individually, and as mother and next friend of Quenten Loftin, a minor; ELISHA PORTERFIELD, Individually, and as motion [sic] and next friend of LaQuante Porterfield, a minor; DAPHINE SUDDARTH, Individually, and next friend of Ronisha Suddarth, a minor,

Plaintiffs-Appellants,

v.

HEAD START, INC., an Oklahoma Corporation; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOM [sic]; JOHN DOE, Sued as: Doe Government Agents 1 through 5;

Nos. 01-5098
01-5177

and John Does 1 through 10; JOHN
DOES, 1 THROUGH 10; PEGGY
DOE,

Defendants,

and

COMMUNITY ACTION PROJECT
OF TULSA COUNTY, OKLAHOMA,
an Oklahoma not-for-profit
corporation; TULSA CITY-COUNTY
HEALTH DEPARTMENT; KD
ENTERPRISES, INC., an Oklahoma
Corporation; JACKIE STRAYHORN,
ARNP; KIM BAKER, sued ad [sic]:
K. Baker, RN,

Defendants-Appellees.

ORDER

Filed August 29, 2003

Before **SEYMOUR** and **McCONNEL**, Circuit Judges and **KRIEGER***, District Judge.

Appellee Community Action Project's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

---

* Honorable Marcia S. Krieger, United States District Judge for the District of Colorado, sitting by designation.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Audrey F. Weigel
Deputy Clerk

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

45 C.F.R. § 1304.20(a)(1)(i) & (ii) (2003)
Child health and developmental services.

(a) Determining child health status.

(1) In collaboration with the parents and as quickly as possible, but no later than 90 calendar days (with the exception noted in paragraph (a)(2) of this section) from the child's entry into the program (for the purposes of 45 CFR 1304.20(a)(1), 45 CFR 1304.20(a)(2), and 45 CFR 1304.20(b)(1), "entry" means the first day that Early Head Start or Head Start services are provided to the child), grantee and delegate agencies must:

(i) Make a determination as to whether or not each child has an ongoing source of continuous, accessible health care. If a child does not have a source of ongoing health care, grantee and delegate agencies must assist the parents in accessing a source of care;

(ii) Obtain from a health care professional a determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care which includes medical, dental and mental health. Such a schedule must incorporate the requirements for a schedule of well child care utilized by the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program of the Medicaid agency of the State in which they operate, and the latest immunization recommendations issued by the Centers for Disease Control and Prevention, as well as any additional recommendations from the local Health Services Advisory Committee that are based on prevalent community health problems:

(A) For children who are not up-to-date on an age-appropriate schedule of well child care, grantee and delegate agencies must assist parents in making the necessary arrangements to bring the child up-to-date;

(B) For children who are up-to-date on an age-appropriate schedule of well child care, grantee and delegate agencies must ensure that they continue to follow the recommended schedule of well child care; and

(C) Grantee and delegate agencies must establish procedures to track the provision of health care services.

. . .